(16)

No. 04-1327 *** CAPITAL CASE ***

Title: Bobby Lee Holmes, Petitioner

v.

South Carolina

Docketed: April 5, 2005

Lower Ct: Supreme Court of South Carolina

Case Nos.: (25886)

Decision Date: November 1, 2004

Rehearing Denied: December 1, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Feb 8 2005	Application (04A699) to extend the time to file a petition for a writ of certiorari from March 1, 2005 to March 31, 2005, submitted to The Chief Justice.
Feb 17 2005	Application (04A699) granted by The Chief Justice extending the time to file until March 31, 2005.
Mar 31 2005	Petition for a writ of certiorari filed. (Response due May 5, 2005)
Apr 11 2005	Brief amicus curiae of Innocence Project filed.
Apr 20 2005	Brief amicus curiae of Certain Professors of Evidence Law filed.
May 5 2005	Order extending time to file response to petition to and including June 6, 2005.
Jun 10 2005	Brief of respondent South Carolina in opposition filed.
Jun 14 2005	Order further extending time to file response to petition to and including June 13, 2005.
Jun 22 2005	DISTRIBUTED for Conference of September 26, 2005.
Jun 29 2005	Reply of petitioner Bobby Lee Holmes filed. (Distributed)
Jul 12 2005	Record Requested .
Jul 26 2005	Record received from the Supreme Court of South Carolina (one box).
Sep 27 2005	Petition GRANTED limited to Question 1 presented by the petition for certiorari.
Oct 14 2005	Extension of time within which to file petitioner's brief on the merits and the joint appendix to and including November 30, 2005.
Nov 30 2005	SET FOR ARGUMENT on Wednesday, February 22, 2006.
Nov 30 2005	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Nov 30 2005	Brief amicus curiae of The Innocence Project, Inc. filed.
Nov 30 2005	Joint appendix filed. (Jt. appendix in 2 volumes)
Nov 30 2005	Brief of petitioner Bobby Lee Holmes filed.
Nov 30 2005	Brief amicus curiae of Forty Professors of Evidence Law filed.
Dec 9 2005	CIRCULATED.
Dec 20 2005	Order extending time to file respondent's brief on the merits to and including January 11, 2006.
Jan 11 2006	Brief amici curiae of Kansas, et al. filed. (Distributed)
Jan 11 2006	Brief of respondent South Carolina filed. (Distributed)
Jan 25 2006	Motion of Kansas, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Feb 9 2006	Reply of petitioner Bobby Lee Holmes filed. (Distributed)
Feb 17 2006	Motion of Kansas, et al. for leave to participate in oral argument as amici curiae and for

divided argument GRANTED.

Feb 22 2006 Argued. For petitioner: John H. Blume, Ithaca, N.Y. For respondent: Donald J. Zelenka, Assistant Deputy Attorney General, Columbia, S.C.; and Steffen N. Johnson, Chicago, IL., (for Kansas, et al., as amici curiae, supporting respondent)

Supreme Court, U.S.
FILED

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No. 04-

IN THE

Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In South Carolina, a criminal defendant's evidence of third-party guilt is inadmissible if, when comparing this evidence standing alone against the prosecution's evidence, the trial court finds that it fails to create a reasonable inference of innocence. In making this comparison, if the trial court finds the prosecution's evidence – and especially its forensic evidence – to be "strong," third-party guilt evidence is per se inadmissible because it is deemed, as a matter of law, to be insufficient to "overcome" the prosecution's evidence so as to create a reasonable inference of innocence.

1. Whether South Carolina's rule governing the admissibility of third-party guilt evidence violates a criminal defendant's constitutional right to present a complete defense grounded in the Due Process, Confrontation, and Compulsory Process Clauses?

2. Whether a capital defendant is denied due process when a prosecutor successfully moves for the exclusion of third-party guilt evidence and then, in closing argument, urges the jury to find the defendant guilty because of the absence of such evidence?

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OPINIONS BELOW

The opinion of the South Carolina Supreme Court (Pet. App. 1a-18a) is reported at 605 S.E.2d 19. The order of the South Carolina court of general sessions (Pet. App. 19a-24a) is unreported.

JURISDICTION

The South Carolina Supreme Court's judgment was entered on November 1, 2004. A timely petition for rehearing was denied on December 1, 2004 (Pet. App. 25a). On February 17, 2005, this Court granted Petitioner an extension until March 31, 2005 to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV.

The Sixth Amendment of the Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.

STATEMENT OF THE CASE

A. The Assault and the Victim's Description of Her Assailant

On December 31, 1989 between 6:00 and 7:00 a.m., eighty-six year old Mary Stewart was beaten, raped, and robbed in her York, South Carolina home. After the assailant left, Ms. Stewart called her friend Maggie Thrasher and reported that she had been assaulted by "a dark chunky fellow," "kind of short [and] dark skinned." (Tr. 2148, 2150.) Ms. Thrasher contacted Alaine Byers, another friend of Ms. Stewart's, who had a car and a key to her house. (Tr. 2153-54.) Ms. Byers reached Ms. Stewart's apartment around 8:00

a.m. and found her in her bedroom. (Tr. 2163-65.) When Ms. Byers asked who had attacked her, Ms. Stewart replied, "I don't know who he was. All I know is he was big and dark." (Tr. 2167.)

After being contacted by Ms. Byers, three officers from the York City Police Department responded to the crime scene, arriving around 8:15 a.m. (Tr. 2326.) As the police began collecting evidence, Ms. Stewart was taken to the hospital where she described her assailant to ER nurse Carol Cole as in his "late twenties." (Tr. 2235.) Sometime in the late morning or early afternoon, with her mental state deteriorating, Ms. Stewart also gave Lieutenant Wilson Barnett a taped statement. (Tr. 2329, 2260-61.) She told Barnett that her assailant was wearing a blue or black sweatshirt, but that she could not see well without her glasses. (Tr. 2357.) Ms. Stewart further described her assailant as "middle-aged, he was young, he was not too young, and he as I remember his hair was not short and not too long . . . [his hair was] kind of long, not too long but a little longer than you [Lieutenant Barnett] usually wear it." (Tr. 2346, 2350, 2352.)

This was the last description Ms. Stewart gave. During the attack she suffered a massive brain trauma that eventually debilitated her and ultimately caused a fatal pneumonia. (Tr. 3614.)

B. Petitioner Becomes the Prime Suspect Although No Evidence Links Him to the Crime

Several hours before the attack on Ms. Stewart, York Police Officer Grady Harper was dispatched to break up a disturbance at the Cannon Court Apartments, which are located several blocks from Ms. Stewart's home. (Tr. 2394, 2834-35.) Harper found Petitioner Holmes and another man in an argument, surrounded by onlookers. (Tr. 2395-96, 2427, 3664, 3680.) Harper asked the group to disperse, and most did, but Petitioner chose instead to taunt Harper with what Harper described as "a few choice words." (Tr. 2395-2403, 2406-07.) Harper then called for back up, intending to arrest

Petitioner. (Tr. 2397.) As soon as additional officers arrived, Petitioner ran. (Tr. 2398, 2427-29, 3665.) After hiding behind a brick wall, he managed to flag down and jump into a friend's car. (Tr. 2401, 3665-67.) Within minutes, however, Harper caught sight of Petitioner and initiated a traffic stop of the car in which he was riding. (Tr. 2401, 2430, 3667-68.) Once again, Petitioner ran, this time eluding both Harper and a second set of officers called to join the chase. (Tr. 2403, 2421, 3668.) The police last reported seeing Petitioner at 5:20 a.m. (roughly an hour before Ms. Stewart's assault), running in the opposite direction of Ms. Stewart's apartment. (Tr. 2409, 2422.)

By 11:30 a.m., the police identified Petitioner, the late-night troublemaker who had gotten away, as their prime suspect in the attack on Ms. Stewart. (Tr. 2497.) At this time, however, the police had no physical evidence linking Petitioner to the crime, no witnesses placing Petitioner near Ms. Stewart's apartment at any time, much less near the time of the assault. (Indeed, no such witness ever emerged). To the contrary, the police had a physical description (middle-aged with longish hair) that did not match Petitioner, and had also received information from one of Ms. Stewart's neighbors (Delores Brown) that a man named Jimmy White (who fit the description better and had a history of violence, including against an older woman) had been on Ms. Stewart's street around the time of the assault. (Third-Party Guilt Hr'g, Aug. 15, 2001, Tr. 6-7, 26.)

C. The Police Evidence Collection and Petitioner's Arrest

On arriving at Ms. Stewart's apartment, the police began their investigation. Officer Dale Edwards collected Ms. Stewart's nightgown, robe, and slippers from the bathroom floor (where Ms. Stewart had dropped them) and placed all of them inside a single paper bag obtained from Ms. Stewart's kitchen. (Tr. 2201, 2215, 2338.) Edwards assisted Lieutenant Barnett in folding the bed sheets, each man holding the four corners extended, and together folding the sheets into halves. (Tr. 2184, 2334-35.) They placed the sheets and pillow cases together in another paper bag from

Ms. Stewart's kitchen. Edwards also retrieved from Ms. Stewart a paper towel that she said had evidence on it. (Tr. 2186.) During this evidence retrieval and collection, neither Edwards nor Barnett wore gloves. (Tr. 2215, 2334.)

Outside the apartment, another officer ran a bloodhound around the perimeter of the Housing Authority apartments. (Tr. 2376-77.) The search yielded a man's tank top on a beaten path leading from the apartments to a street circling the parking lot for the housing complex. (Tr. 2377, 2383.) Although the police sent this evidence to the State Law Enforcement Division ("SLED") for forensic analysis, it was never tested for DNA. (Tr. 3169-70, 3182.)

Around 8:45 a.m., Captain William Mobley arrived to take charge of the investigation. (Tr. 2755.) After locking the door to Ms. Stewart's apartment, he decided to process the crime scene by himself. (Tr. 2482.) In addition to taking photographs, Mobley dusted for fingerprints, including the telephone and pocketbook that Ms. Stewart said the assailant had touched. On these, Mobley purportedly found only smudges. (Tr. 2340, 2485, 2487-88, 2495.) Indeed, at trial, Mobley would claim that in the entire apartment he found just two usable prints. (Tr. 2488, 2493.) The first was a partial palm print that he claimed to have lifted from the interior of Ms. Stewart's door. The second print was purportedly taken from the exterior of the door. (Tr. 2493.) Mobley also discovered a footprint, though he omitted it from his diagram of the crime scene. (Tr. 2737, 2748.)

At 2:00 p.m. Mobley and Officer James "Boot" Smith drove to the hospital where Ms. Stewart was initially admitted to pick up the rape kit containing vials of her blood. (Tr. 2240, 2530.) The rape kit, however, was both incomplete and compromised. Because of Ms. Stewart's condition, the nurse did not perform a pelvic exam; nor did she take fingernail scrapings. (Tr. 2236, 2244-45.) Most important, the vacutainers she used to collect Ms. Stewart's blood had long since passed their expiration date (Tr. 2250), thus rendering the blood useless for DNA testing. (Tr. 3446-47, 3616-17, 3783.) Later, law enforcement allegedly lost a second, more complete rape kit altogether. (Tr. 2282-85; 3763.)

With the victim's blood in hand, Mobley and Smith decided next to go to the Petitioner's apartment, having designated him as the prime suspect despite an absence of any supporting evidence. After finding Petitioner in his bedroom wearing a black-hooded sweatshirt and a pair of briefs, the officers arrested him, not for the assault on Ms. Stewart, but for a completely unrelated theft, and also seized certain clothing items. (Tr. 2498, 2511-13.) Petitioner was charged for the Stewart crimes nearly two months after his arrest. Indictment for Criminal Sexual Conduct, Feb. 26, 1990; Indictment for Robbery, Feb. 26, 1990; Indictment for Burglary, Feb. 26, 1990; Indictment for Murder, Apr. 9, 1990 (following Ms. Stewart's death).

D. The Prosecution Case and Petitioner's Defense

In the absence of any eyewitness testimony linking Petitioner to the attack on Ms. Stewart, the State based its prosecution almost entirely on "forensic" evidence. Specifically, the State argued that the following evidence tied Petitioner to the crime: (1) a mixture of DNA taken from Petitioner's underwear from which the Petitioner and the victim allegedly could not be excluded as donors; (2) a mixture of DNA taken from Petitioner's shirt allegedly containing a mixture of Petitioner's and the victim's blood (Pet. App. 6a); (3) a mixture of DNA taken from a paper towel found in Ms. Stewart's home from which the Petitioner and the victim allegedly could not be excluded as donors (Tr. 3529, 3823); (4) three sets of allegedly "consistent" but common fibers found on Ms. Stewart's and Petitioner's clothing; (5) Petitioner's palm print allegedly found on the interior of Ms. Stewart's door, (Pet. App. 5a); and (6) money found in Petitioner's wallet coinciding with an amount ($40) allegedly taken from Ms. Stewart, (Tr. 2153, 2521).

At his re-trial,[1] Petitioner, who had maintained his innocence from the outset, prepared a two-pronged defense.

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1. Petitioner's first trial took place in April 1993. *See State v. Holmes*, 464 S.E.2d 334 (S.C. 1995). He was convicted on all counts. *Id.* In January

(Cont'd)

First, he intended to attack his prosecution as a rush to judgment, the result of a sloppy investigation that failed to pursue leads such as the tank top found near the scene, the footprint found at the scene, and substantial evidence that the crime was actually committed by Jimmy White. Second, Petitioner planned to attack the prosecution's "forensic" evidence. Specifically, he intended to show that the blunders in the collection of evidence compromised the testing; that in any event the forensic test results were inconclusive; and, furthermore, that, regardless of the test results, the blood evidence yielding the DNA results in the case had been planted by Captain Mobley.

As central to this appeal, Petitioner informed the prosecution and the trial court that the defense intended to present evidence that Jimmy White actually committed the crime. Multiple witnesses placed White near the scene of the crime and heard him confess to the crime. In its totality, the third-party guilt evidence that Petitioner proffered during pre-trial hearings provided comprehensive support for Petitioner's actual innocence defense by casting doubt on both the State's investigation of the crime and the reliability of the forensic test results.

In particular, Petitioner offered four proximity witnesses, including at least one whom the police had interviewed on the day of the crime, all of whom placed White in Ms. Stewart's neighborhood on the morning of the assault. (Pet. App. at 7a-8a.) Two of the proximity witnesses also saw White headed in the direction of Ms. Stewart's home near the time of the assault. *Id.*

Next, Petitioner offered the testimony of four independent and mutually corroborating witnesses who heard White confess to assaulting Ms. Stewart. *Id.* at 8a-10a. In White's

(Cont'd)

1998, Petitioner's conviction was reversed in state post-conviction proceedings due to the trial court's failure to secure a valid waiver of Petitioner's right to make a closing argument and trial counsel's failure to advise him that he could decide whether to exercise or waive that right. *Holmes v. Moore*, 96-CP-46-966, Order (Jan. 15, 1998).

confession to one of these witnesses, Ken Rhodes, White demonstrated specific knowledge of the assault on Ms. Stewart, revealing that Ms. Stewart was alive when he left the apartment after he had sex with her. *Id.* at 8a; Third-Party Guilt Hr'g, Aug. 21, 2000, Tr. 89. In White's confession to Stephen Westbrook, White stated that Smith (one of the arresting officers) had warned White to remain silent about his role in the assault because Smith wanted to convict Petitioner for the crime. (Pet. App. 9a.) Westbrook also testified that the solicitor's office told him that they manufactured evidence against Petitioner and asked Westbrook to testify falsely that Petitioner confessed to the assault. *Id.* Furthermore, White informed a fifth witness, the former receptionist at the York County Public Defender's Office, that he did not believe Petitioner was guilty and that everyone on the street knew who had committed the crime. *Id.* at 10a.

In addition to these proximity and confession witnesses, Petitioner offered evidence that White had a motive to assault Ms. Stewart and had given the police a false alibi. To establish White's motive, Petitioner offered evidence that White had a penchant for older women and was prone to violent relationships.[2] With respect to the alibi, White admitted to the police that he had been near Ms. Stewart's neighborhood shortly before the assault, but claimed by the time of the assault that he was at his home in Sharon, South Carolina, having been driven there by Joshua Lytle. *Id.* Lytle, however, told the police (and later testified at the pre-trial hearing) that he did not drive White home. *Id.* at 21a.

2. The evidence included the following: (1) Ken Rhodes' testimony that White told him he liked older women; (2) the affidavit of Carrie Simpson, an older woman, stating that White made sexual advances toward her and hit her when she rejected the advances; and (3) a psychological evaluation of White concluding that he had problems in relationships with women to which he might respond violently and that he had sexual fantasies of dominance causing him to behave inappropriately. (Third-Party Guilt Hr'g, Aug. 21, 2000, Tr. 90; Ex. 14 Def.'s July 30, 2000 Br.; Ex. 13 Def.'s July 30, 2000 Br.).

Furthermore, White's own testimony at the pre-trial hearing denying involvement in the crime included numerous instances of taunting from which a juror might have inferred actual involvement (*i.e.* "Man, if I would have did something like that, I wouldn't tell it.") (Third-Party Guilt Hr'g, Aug. 14, 2001, Tr. 305.)[3] Finally, White—a twenty-two year old African American with hair longer than Petitioner—more closely matched Ms. Stewart's physical description of her assailant than did Petitioner at the time the crime was committed.[4]

E. The Trial Court Excludes All Petitioner's Third-Party Guilt Evidence

The trial court found that Petitioner's proximity witnesses created an evidentiary basis from which a jury could conclude that White was in the right place at the right time to have committed the crime. (Pet. App. at 20a-21a.) It also found Lytle's testimony to be a credible rebuttal to White's purported alibi. *Id.* The trial court further found that four separate witnesses provided testimony from which a jury could conclude that White confessed to beating and raping Ms. Stewart. *Id.* at 21a. Although the court found the evidence of White's penchant for older women "marginal," it still deemed it probative of the issue of White's motive to commit the assault. *Id.*[5]

Nonetheless, the trial court excluded all Petitioner's proffered third-party guilt and police framing evidence. It ruled that the most telling evidence—the testimony as to

3. Testifying regarding his whereabouts that night, White stated: "[I]f I was anywhere over that way, like I said, I be drunk and, like, if I would have been there ... they'd have got me right then and there, you know ... drunk as I be ... How did I get away? You tell me that." Third-Party Guilt Hr'g, Aug. 14, 2000, Tr. 304.

4. Petitioner's hair was very closely cut in his mug-shot taken on January 1, 1990. (Tr. 2777-78.) In contrast, a mug-shot of Jimmy White taken on January 31, 1990 shows White with longer hair. (Pet. App. at 7a.)

5. Later, during the trial, the judge candidly stated that the confessions continued to "bother" him because they "rise to the level of raising some question" about Petitioner's guilt. (Tr. 2024.)

White's multiple confessions—was inadmissible hearsay. (Pet. App. 22a.) Without the confession evidence, the court continued, the remaining evidence was insufficient to establish "facts or circumstances which clearly point to Mr. White ... as the person guilty of the beating and rape of Mary Stewart." *Id.* at 23a-24a. Absent such a showing, the court concluded, the evidence did not meet South Carolina's standard for admitting evidence of third-party guilt. *Id.* at 24a.

During trial, the court also precluded the defense from using the third-party guilt evidence to cross-examine the State's police witnesses about their investigation, including asking why the police—having been told that White, a violent felon, had been near Ms. Stewart's apartment around the time of the assault—decided not to test the footprint found at her apartment against White (it did not match Petitioner) or to test White's clothes for the victim's blood. (Tr. 2695-96.) Initially, the court ruled that it would permit this use of the third-party guilt evidence to probe the police investigation.[6] But immediately before the defense began its cross-examination of police witnesses, the court reversed course and denied the defense any use of this evidence whatsoever.[7]

F. The Forensic Evidence at Trial

The exclusion of the third-party guilt evidence deprived Petitioner of much of his ability to attack the State's case. *See Old Chief v. United States*, 519 U.S. 172, 187-89 (1997)

6. Tr. 2028:9-12 ("THE COURT: ... [T]he defense, while maybe not entitled to present that [Jimmy White evidence] as a defense, certainly would appear to have the right to develop the extent of the investigation."); *id.* at 2683:18-22 ("MR. POPE: [T]hey can ask specifically about Jimmy White? Is that what the court is ruling? THE COURT: Well, if [York Police] had him come in and give a statement, yes."); *id.* at 2685:2-8 ("THE COURT: I'm going to limit it [the cross-examination] to you inquiring ... about whether there were other suspects. ... But if he says yes, then I think [the Defense] have got a right to know who[,] why they ruled that suspect out.").

7. *Id.* at 2711:2-3; *id.* at 2713:16-20 ("MR. NETTLES: ... The court has ruled that I can't discuss in any way, shape or form the investigation of anyone [other than Defendant] in relation to the commission of this crime? THE COURT: That's the ruling.").

(discussing a narrative's power to increase a jury's willingness to draw inferences). Instead of being able to use the third-party guilt evidence to support his claim of innocence and to undermine the prosecution's forensic case, Petitioner was left with only expert testimony attacking the State's forensic evidence collection and testing, as well as a circumstantial case raising the possibility of a police frameup. Even this severely diminished defense, however, was substantial.

With respect to the issue of contamination, the officers who gathered evidence from Ms. Stewart's home conceded that they did not wear gloves while collecting the evidence and placed evidence in paper bags from Ms. Stewart's kitchen. (Tr. 2201-03, 2338.) After all the evidence was collected, Mobley created evidence logs. (Tr. 2561-63.) He testified that while creating the logs he went through all the evidence from the case simultaneously, including both Stewart's and Petitioner's items, without wearing gloves and without washing his hands between handling individual items of evidence. (Tr. 2559, 2561-63.) As defense expert John Kilbourn explained, fiber evidence is easily transferred. (Tr. 3882.) Because Mobley failed to wash his hands or put on new gloves between handling items of evidence obtained from Ms. Stewart and items of evidence obtained from Petitioner, he readily could have transferred fibers between Petitioner's items and Ms. Stewart's. (Tr. 3883-85.) Similarly, as defense experts Janine Arvizu and Peter D'Eustachio explained (and prosecution's expert witness Sam Baechtel confirmed), officers can transfer DNA through such handling. (Tr. 3547, 3766, 3805.) The relatively small amount of blood on Petitioner's shirt, jeans, and underwear (Tr. 3208-09) further supported a cross-contamination theory.

The State's fiber analyst, moreover, compounded the danger of contamination by using the "scraping method" to obtain the fiber samples. This method involves hanging items of evidence in the air and using a metal instrument to scrape off fibers. (Tr. 3886.) As Kilbourn testified, however,

the scraping process often leaves fibers in the air where they remain for varied periods of time. (Tr. 3888.) The airborne fibers may land on items of evidence scraped at a later time in the same locale. (Tr. 3888.) Accordingly, fiber analysts typically minimize the danger of airborne fiber transfer by scraping evidence from the suspect and victim in separate rooms and on different days. (Tr. 3884, 3889.) A different analyst may even handle each item. (Tr. 3889.) Here, the fiber analyst testified that he scraped evidence from Petitioner's belongings and Ms. Stewart's belongings in the same room. (Tr. 3018, 3020.) There is no evidence that he scraped the items on different days. Furthermore, Kilbourn opined that two sets of the allegedly "consistent" fibers came from a third source, meaning that they did not come from either Petitioner's clothing or Ms. Stewart's nightgown and bed sheets. (Tr. 3028, 3038.) Yet the State made no effort to determine the source of these fibers. (Tr. at. 3036.)

Even if the presence of DNA and fibers was not the result of contamination, other evidence cast serious doubt on the State's conclusions about the source of both the DNA and the fibers. With respect to the DNA evidence, Petitioner's expert testified that the charts generated from the DNA mixtures on Petitioner's shirt and underwear exhibited abnormal characteristics that modern science could not explain. (Tr. 3818-26.) In light of the unusual nature of the charts, he opined that the evidence did not establish that the DNA mixture came from Petitioner and Ms. Stewart. (Tr. 3824.) Similarly, defense experts testified that the State's fiber analyst relied on imprecise and outdated methods to determine whether the fibers found on Petitioner's clothing matched the fibers found on Ms. Stewart's bed sheets and nightgown. (Tr. 3887-88, 3890, 3892-96, 3912.) After using a microscope to conclude that the material and general color of the fibers were consistent, the analyst failed to perform either an Optical Properties Refractive Index test (OPRI) or chemical analysis of the fibers' dye. (Tr. 3891, 3893-96.) An OPRI test would have given the fiber analyst a more precise color match while a chemical analysis of the dye could have conclusively established that the fibers were consistent. (Tr. 3891, 3893-96.)

The remaining "forensic evidence" was consistent with Petitioner's defense that the York police framed him. First, Petitioner presented evidence that the palm print that Captain Mobley allegedly found on the interior of Ms. Stewart's door was planted or came from another place. When a person touches a rough or uneven surface, the surface creates striations in his or her print. (Tr. 2897-98.) Both defense and prosecution experts agreed that the palm print attributed to Petitioner contains striations indicative of a rough surface. (Tr. 2896-98, 3990-91.) According to defense expert Donald Girndt, however, the interior of Ms. Stewart's door is not the type of surface that would create such striations. (Tr. 3965, 3990-91.) Mobley's testimony regarding fingerprints was also dubious. For example, he claimed to have been able to lift only two usable prints from the whole apartment—an inherently implausible claim also contradicted by SLED Agent Steven Derrick, who testified that they probably could have used the purportedly "smudged" prints taken from the telephone and pocketbook. (Tr. 2908.) In addition, the donor of a second print found on Ms. Stewart's door was never identified, even though Petitioner's prints did not provide a match. (Tr. 2876.)

Second, the defense presented evidence that Mobley planted the DNA allegedly found on Petitioner's clothing and on the paper towel. The State allegedly lost Ms. Stewart's rape kit which contained her blood, her vaginal swab, her rectal smear, and her saliva.[8] (Tr. 2284, 3372, 3763.) The missing blood samples and rectal smears provided Captain Mobley with ample opportunity to plant DNA on Petitioner's clothing. Despite this, the State failed to test the blood ultimately found on Petitioner's clothing or the DNA ultimately found on the paper towel for the preservatives known to be in the missing blood samples. (Tr. 3562, 3765.) Such testing for preservatives is common

8. Losing the rape kit was only one of SLED's many mistakes. SLED also sent Petitioner's blood sample to the FBI for testing under Ms. Stewart's name and erroneously informed the FBI that Ms. Stewart was Caucasian. (Tr. 3333.)

practice when blood samples are missing because of the danger that they have been used to plant evidence. (Tr. 3770.) The State offered no explanation for its failure to test for the preservatives.

The State's failure to test the blood stains for preservatives known to be in the missing blood samples was even more suspicious in light of the fact that an evidence log Mobley generated made no mention whatsoever of blood or other stains being detected on Petitioner's shirt or underpants, even though other evidence logs referenced the existence of blood or other stains on items of evidence. (Tr. 2619-21.) While the evidence log does note blood on the paper towel, Mobley did not turn the paper towel over to SLED until eight days after he provided SLED with the rest of the evidence. (Tr. 2618-19.) At trial, Mobley failed to give a coherent explanation for failing to promptly send the allegedly bloody paper towel to SLED. (Tr. 2618-19.)

Finally, the State failed to test the money found in Petitioner's wallet for Ms. Stewart's prints. (Tr. 2614, 3944.) As defense expert Girndt testified, SLED was capable of taking fingerprints off currency, and did take fingerprints off currency whenever a local investigator submitted currency to it. (Tr. 3966.) Yet the State failed to take this elementary step that could have either further inculpated or exonerated Petitioner. Instead, it argued that Petitioner's possession of the commonplace amount of $40 somehow implicated him in the crime. (Tr. 4195-96.)

G. The Prosecutor's Closing Argument

In closing argument at the guilt or innocence phase of the trial, the prosecutor, having successfully excluded Petitioner's evidence of third-party guilt, argued that Petitioner's failure to introduce evidence of a third party's guilt showed that he was the guilty party. On numerous occasions, the prosecutor remarked on Petitioner's failure to introduce evidence that a third party committed the crime. (Tr. 4212, 4215, 4220.) Summing up the point, the prosecutor explicitly stated, "if you are going to frame them

(sic) and it's going to be Bobby Holmes, where is the raping, murdering, beating fellow that actually did this thing." (Tr. 4220.)

Defense counsel objected to the prosecution's tactics as soon as the prosecutor ended his closing argument and requested a mistrial. (Pet. App. 28a.) Defense counsel argued that the prosecutor's remarks prejudiced Petitioner because of the exclusion of the third-party guilt evidence, and that a new trial was necessary so that the evidence could be presented in response to the prosecution's comments. *Id.* at 28a-29a. When the trial court denied relief, *id.* at 29a, Petitioner requested a special curative instruction, which was also ultimately denied, *id.* at 30a. The jury then convicted Petitioner on all counts. *Id.* at 1a.

At the sentencing phase, Petitioner once again attempted to introduce the evidence of White's guilt. Petitioner maintained both that the information was relevant mitigating evidence and that its exclusion would amount to a denial of due process. Again, the trial court excluded the evidence. (Tr. 4404.) The jury sentenced Petitioner to death. (Pet. App. 1a.)

H. Petitioner's Direct Appeal

On direct appeal, the South Carolina Supreme Court affirmed Petitioner's conviction and sentence. (Pet. App. at 17a.) The Court did not disturb the trial court's findings that Petitioner had presented sufficient credible evidence from which a jury could conclude that Jimmy White had the opportunity and motive to attack Ms. Stewart and that he had confessed to no fewer than four people. At the same time, the Court did not follow the trial court's rationale for nonetheless excluding the evidence—namely, that the confession evidence was inadmissible hearsay.[9]

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9. Although not germane to this petition, the trial court's hearsay ruling was clearly wrong. White's confessions were admissible under South Carolina Rule of Evidence 801(d)(1).

Instead, the Court affirmed the exclusion of the third-party guilt evidence by establishing, as a practical matter, a new standard for the admission of third-party guilt evidence in cases where the prosecution relies on forensic evidence. As a starting point, the Court noted that, in order to be admissible, third-party guilt evidence must involve "a train of facts or circumstances as tends clearly to point out such other person as the guilty party" or, put differently, must raise "a reasonable inference as to the appellant's own innocence." (Pet. App. at 11a.) In addition, the Court held that, where there is "strong evidence of appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." *Id.* at 12a. In such circumstances, even third-party guilt evidence such as that presented in this case—evidence that, if believed, would directly and conclusively exonerate the defendant—"cannot overcome the forensic evidence" and thus fails the test of admissibility as a matter of law. *Id.*

The Court also declined to address the constitutionality of the State's emphasis in its closing argument on the absence of third-party guilt evidence, asserting that this issue had not been preserved for appellate review because Holmes failed to lodge a "contemporaneous objection." *Id.* at 14a.

Judge Pleicones dissented. *Id.* at 17a-18a. After summarizing the additional evidence presented at trial undermining the integrity of the forensic evidence, he stated, "considering the record as a whole, the State's evidence was not sufficient to negate the 'reasonable inference' of [Petitioner's] innocence[.]" *Id.* at 18a.

REASONS FOR GRANTING THE PETITION

The Supreme Court of South Carolina held that, in cases involving "strong forensic evidence," a defendant has no right to present third-party guilt evidence to the jury, even where that evidence has been found to be credible, is directly inconsistent with the defendant's guilt, and calls into doubt

the reliability of the forensic evidence that forms the basis for its exclusion. Compounding this error, the state courts allowed the prosecutor to emphasize the defense's lack of third-party guilt evidence even though the State had moved successfully to prohibit the defense from introducing its powerful third-party guilt evidence.

These rulings merit review by this Court. The state supreme court's approach to excluding third-party guilt evidence violates basic due process principles and will undermine the search for truth in every South Carolina criminal trial where such evidence is at odds with a prosecution based largely on forensics. Moreover, in countenancing the prosecutor's closing argument, the South Carolina court violated this Court's due process jurisprudence guaranteeing capital defendants a fair opportunity to rebut the arguments made against them.

I. South Carolina's Approach To Third-Party Guilt Evidence, Including Its Unique Per Se Exclusion Of Third-party Guilt Evidence When The Prosecution's Evidence Is "Strong," Conflicts With This Court's Well-Established Jurisprudence Governing A Criminal Defendant's Constitutional Right To Present A Complete Defense.

This Court has long recognized that, whether rooted in the Fourteenth Amendment's Due Process Clause or in the Sixth Amendment's Compulsory Process or Confrontation Clauses, the U.S. Constitution guarantees every criminal defendant "'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). Indeed, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *see also Washington v. Texas*, 388 U.S. 14, 19 (1967) (Defendant "has the right to present his own witnesses to establish a defense."); *Taylor v. Illinois*, 484 U.S. 400, 408 (1988) (same).

This right to call defense witnesses is central to two basic premises of our system of criminal justice: first, that the prosecution's case must "'survive the crucible of meaningful adversarial testing,'" *Crane*, 476 U.S. at 690-91 (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984)); and second, that within this crucible, the jury—not the judge—serves as "the lie detector" assessing the relevant, competent evidence. *United States v. Scheffer*, 523 U.S. 303, 313 (1998). As this Court summarized in *Washington v. Texas*, "[t]he conviction of our time [is] that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined" by the trier of fact. 388 U.S. at 22.

Applying these principles, this Court has invalidated numerous evidentiary bars to the admission of defense witness testimony. *E.g.*, *Crane*, 476 U.S. at 691 (overturning bar on introduction of evidence regarding the circumstances of a confession); *Rock v. Arkansas*, 483 U.S. 44, 61 (1987) (overturning bar to admission of hypnotically refreshed testimony); *Washington*, 388 U.S. at 22 (overturning bar on testimony by accomplices or accessories). Indeed, in a case closely analogous to this one, this Court declared unconstitutional the application of certain Mississippi evidentiary rules that barred a defendant from introducing evidence of third-party guilt, specifically the testimony of three witnesses that another party had confessed to the crime. *See Chambers*, 410 U.S. at 302 (combination of "voucher" and hearsay rules precluded introduction of third-party confessions as well as effective cross-examination of witness who repudiated prior confession and offered an alibi).

In all these cases, the Court recognized that state courts have considerable latitude in fashioning and applying evidentiary rules "designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Scheffer*, 523 U.S. at 330 n.17 (quoting *Chambers*, 410 U.S. at

302). But this Court has never countenanced rules excluding "competent, reliable evidence" from percipient witnesses who would testify directly to a defendant's innocence. To the contrary, the Court has struck down "arbitrary" rules regarding witness competence and "mechanistic" approaches to the reliability of evidence. In so doing, the Court has sought to preserve the accused's right to present a defense and to protect the jury's role as the finder of fact and arbiter of witness credibility in criminal cases. *Chambers*, 410 U.S. at 302; *Washington*, 388 U.S. at 23.

South Carolina's rule governing the admissibility of third-party guilt evidence cannot be squared with these core constitutional tenets. Under South Carolina law, a defendant cannot introduce third-party guilt evidence unless the third-party guilt evidence, standing alone, "overcomes" the State's evidence and establishes "a reasonable inference . . . as to his own innocence" or, put differently, "such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party." (Pet. App. at 11a-12a (quoting *State v. Gregory*, 16 S.E.2d 532, 534 (S.C. 1941))). Worse still, when the State presents "strong forensic evidence" of guilt, South Carolina flatly prohibits the defendant from introducing third-party guilt evidence because, in such circumstances, third-party guilt evidence purportedly "does not raise a reasonable presumption" of innocence and "cannot overcome" the State's case. *Id.* at 12a (citing *State v. Gay*, 541 S.E.2d 541 (S.C. 2001)). This is true even, as here, where the third-party guilt evidence undermines the forensic evidence on which the exclusionary rule is based, because the "strength" of the prosecution's case is measured solely on the basis of the State's evidence regardless of any countervailing defense.

South Carolina's approach to third-party guilt evidence offends at least three constitutional principles.

First, its limitation on third-party guilt evidence, including a per se exclusion where the prosecution case is "strong," offends the general constitutional rule described above that a defendant is entitled to put before the jury the

testimony of competent witnesses with first-hand knowledge directly relevant to the question of guilt or innocence.

Second, it relieves the prosecution of its constitutionally imposed burden of proving guilt beyond a reasonable doubt by making the admissibility of relevant defense evidence hinge on a defendant's ability to overcome the prosecution's evidence and raise a reasonable inference of innocence. *E.g. In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Under South Carolina's approach, a defendant does not merely have to show that the evidence in question is genuinely probative of third-party guilt (as opposed to conjectural) or even that the evidence, if credited, is sufficient when considered together with other defense evidence to raise a reasonable doubt regarding innocence. Instead, he must show that the third-party guilt evidence, standing alone, "tend[s] clearly" to establish third-party guilt and further, "overcome[s]" the State's evidence to the point of raising a "reasonable inference" of innocence. (Pet. App. at 11a-12a.)

South Carolina thus puts a defendant—even a capital defendant like Petitioner—to a greater burden in seeking to admit exculpatory evidence than the defendant bears in trying to win acquittal before the jury. While the State's third-party guilt rule does not explicitly alter the prosecution's burden to prove guilt beyond a reasonable doubt, it lets the State meet that burden after forcing the defense to carry a preliminary burden of overcoming the prosecution's evidence in order to get its own competent and relevant exculpatory evidence before the jury. This Court long ago recognized that the reasonable doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error." *Winship*, 397 U.S. at 363. Yet in South Carolina, the prosecution gets to attempt to prove guilt beyond a reasonable doubt with the evidentiary deck stacked in its favor.

Third, in a related and equally serious flaw, South Carolina's approach also deprives a defendant of his right

to have a jury determine all facts relevant to the issue of guilt or innocence. *United States v. Booker*, 125 S. Ct. 738 (2005); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In South Carolina, when a defendant seeks to introduce third-party guilt evidence, the judge does not merely determine whether the evidence is relevant or more probative than prejudicial (which are, of course, typical gatekeeper functions). Fed. R. Evid. 401, 403. Instead, before ruling on the admissibility of third-party guilt evidence, the judge becomes a preliminary trier-of-fact to determine the credibility of and weight to be given to the defendant's proffered evidence in relation to the State's evidence; furthermore, where the State's evidence (especially forensic evidence) is deemed "strong," the judge must apply a per se exclusion. This approach deprives a defendant of his right to have the jury find the facts essential to guilt, since the jury's fact-finding is being partially pre-determined and inherently skewed by the role South Carolina assigns to the judge.

This case demonstrates just how pernicious these failings are. The trial court specifically found that the third-party guilt evidence was credible—that it was sufficient to show that White confessed multiple times to the crime; that he was near the site of the crime near the time of the crime; that he generally fit the victim's description of her attacker; that he gave a false alibi; that he had some propensity for older women like the victim; and that he was a violent person. (Pet. App. at 20a-21a.) This evidence, including four mutually corroborating third-party confessions, supported each aspect of Petitioner's defense, namely that the forensic evidence was tainted, inconclusive, or planted, and that Petitioner's own prosecution was the product of a rush to judgment by police offers angered by their previous run-in with him. Like the improperly withheld third-party guilt evidence that compelled this Court to order a new trial in *Kyles v. Whitley*, 514 U.S. 419 (1995), the third-party guilt evidence here "would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation,

as well." *Id.* at 445. Indeed, it can hardly be doubted that the evidence against White would have been sufficient to sustain his conviction for the crime had he been tried for it. Yet under South Carolina's approach, that evidence was per se inadmissible because the state supreme court deemed the State's evidence, evaluated without reference to the defense's rebuttal, to be "strong."[10]

Such an approach advances no discernible legitimate state interest. Naturally, courts have an interest in ensuring that the evidence admitted bears indicia of reliability and also that trials do not get bogged down in litigation over peripheral matters. For this reason, many states provide mechanisms for excluding third-party guilt evidence where that evidence is conjectural or does not genuinely support the defendant's claim of innocence. Such limitations simply are variants on the usual inquiry into relevance or into the probative value of evidence compared to its propensity for prejudice or distraction. But these limitations are a far cry from requiring a defendant to overcome the prosecution's evidence and establish a "reasonable inference" of innocence as a prerequisite to admitting evidence, much less a per se rule of exclusion where the prosecution forensic case is "strong."[11]

South Carolina's approach is "disproportionate" to any legitimate state interest while infringing on "a weighty interest

10. To the minimal extent the state supreme court suggested that the forensic evidence tended to exculpate White, it simply erred. The fact that White's DNA did not appear on clothing samples that consisted mainly of Petitioner's clothes is unremarkable. Because White's clothes were never tested and because the victim bathed immediately after the attack, the absence of DNA evidence, in and of itself, neither inculpated nor exculpated White.

11. The problems with South Carolina's approach are substantially exacerbated by the elevated status it gives to forensic evidence in comparison to other types of evidence. Forensic evidence is only as good as the evidence collection methods and testing techniques actually used, and will also produce false results if the defendant has been framed. Accordingly, where the defendant seeks to impeach forensic evidence on one or more of these grounds, it makes no sense to exclude relevant and material third-party evidence based on the strength of the forensic evidence. The logic of doing so is perfectly circular.

of the accused." *Scheffer*, 523 U.S. at 308. Once third-party guilt evidence is determined to be materially probative of innocence, the assessment of that evidence against the strength of the prosecution's case must be for the jury, not the judge. To provide otherwise, as South Carolina has without reference to or regard for the constitutional standards cabining the State's authority, is to handicap arbitrarily defendants who would deploy evidence of third-party guilt by partially exempting the prosecution from proving its case in "the crucible of meaningful adversarial testing." *Crane*, 476 U.S. at 690-91.[12]

Several states have repudiated South Carolina's burden-shifting "train of facts/reasonable inference" of innocence approach to admitting third-party guilt evidence, and no state (so far as we can discern) applies the evidence-weighing per se exclusion South Carolina has adopted for strong forensic evidence cases.[13] This Court should grant review here to clarify

12. South Carolina's treatment of third-party guilt evidence deserves special scrutiny because it is not a neutral rule of evidence. By its nature, it limits only the defense and not the prosecution. *Compare Scheffer*, 523 U.S. at 327 n.12 (exclusion of polygraph less problematic because it applies to both sides).

13. For a relatively recent discussion of various approaches to admissibility standards for third-party guilt evidence, *see* Brett C. Powell, *Perry Mason Meets the "Legitimate Tendency" Standard of Admissibility (And Doesn't Like What He Sees)*, 2001 Evidence Symposium, 55 U. Miami L. Rev. 1023 (2001).

California, Idaho, and New York have abandoned the "train of facts" standard in favor of more liberal standards. *E.g.*, *People v. Hall*, 718 P.2d 99, 104 (Cal. 1986) (adopting undue prejudice analysis based on state rules of evidence); *State v. Kerchusky*, 67 P.3d 1283, 1287-88 (Idaho Ct. App. 2003) (same); *People v. Primo*, 753 N.E.2d 164, 167 (N.Y. 2001) (same).

Washington and Virginia continue to use the "train of facts" test, but, unlike South Carolina, do not preclude third-party evidence that meets this test where the State's case is based on "strong forensic evidence." *See State v. Maupin*, 913 P.2d 808, 814 (Wash. 1996) (en banc) (testimony that "casts substantial doubt on the State's version of the crime" must be admitted); *Oliva v. Commonwealth*, 452 S.E.2d 877, 880 (Va. Ct. App. 1995) ("[Q]uestion is whether 'facts and circumstances tend[ed] clearly to point out some other person as the guilty party,' thereby raising a question for the jury whether reasonable doubt existed of [defendant's] guilt.").

the constitutional limits on excluding third-party guilt evidence, and, more specifically, to vindicate the integrity and reliability of the process by which the all-important issue of guilt or innocence are decided in South Carolina.

II. After Successfully Urging The Trial Court To Bar Petitioner From Introducing Evidence Of Third-Party Guilt, The State's Assertion In Closing Argument That The Absence Of Such Evidence Demonstrated Petitioner's Guilt Violates The Due Process Right Of Capital Defendants To Fair Rebuttal Recognized By This Court In *Simmons v. South Carolina* And *Skipper v. South Carolina*

Review is also warranted because the State's exploitation in its closing argument of the absence of third-party guilt evidence after the State moved successfully to prohibit Petitioner from introducing that very evidence conflicts with *Simmons v. South Carolina*, 512 U.S. 154 (1994), and *Skipper v. South Carolina*, 476 U.S. 1 (1986), two other South Carolina capital cases. In both those cases, the Court held that the due process right of capital defendants to fair rebuttal was violated when, at the State's urging, petitioners were barred from presenting evidence that would have afforded them an "opportunity to deny or explain" assertions about the evidence against them made by the State during closing argument. *Simmons*, 512 U.S. at 164 (plurality opinion); *id.* at 175 (O'Connor, J., concurring in the judgment); *Skipper*, 476 U.S. at 5 n.1; *id.* at 10 (Powell, J., concurring in the judgment).[14]

14. The due process right of capital defendants to fair rebuttal applied in *Simmons* and *Skipper* derives from *Gardner v. Florida*, 430 U.S. 349 (1977). The defendant in *Gardner* was sentenced to death based on "confidential information" contained in the prosecution's pre-sentence report that was "not disclosed to the defendant or his counsel." *Id.* at 358 (plurality opinion). The Court overturned the sentence. The plurality concluded that the defendant "was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.* at 362 (plurality opinion); *see id.* at 365 (Brennan, J., concurring in part).

In *Simmons*, the State contended in closing argument at sentencing that the defendant's future dangerousness should be considered in determining the appropriate punishment, and that to eliminate that threat, the defendant should be executed. 512 U.S. at 157. To rebut that contention, the defendant requested a clarifying instruction that he was ineligible for parole under State law, and that therefore, if given a life sentence, he would not pose a future danger to society. *Id.* at 158. The prosecutor objected to the proposed instruction and the trial court refused to give it. *Id.* at 159-60.

In overturning the defendant's death sentence, the Court held in *Simmons* that due process was violated because, in closing argument, "[t]he State raised the specter of Petitioner's future dangerousness generally, but then thwarted all efforts by Petitioner to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus . . . would not pose a future danger to society." *Id.* at 165 (plurality opinion). The Court acknowledged that the State could have asserted that, even though defendant was parole ineligible, he would still "pose a danger to others in prison and that executing him is the only means of eliminating that threat." *Id.* at 166 n.5 (plurality opinion). But that is not what the State did in *Simmons*. Instead, it "misl[ed] the jury by concealing accurate information about the defendant's parole ineligibility. The Due Process Clause will not tolerate placing a capital defendant in a straightjacket by barring him from rebutting the prosecution's arguments of future dangerousness with the fact that he is ineligible for parole under state law." *Id.* Justice O'Connor's concurring opinion (joined by Chief Justice Rehnquist and Justice Kennedy) echoed these themes:

> When the State seeks to show the defendant's future dangerousness . . . the fact that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case . . . [I]n such a case the

> defendant should be allowed to bring his parole ineligibility to the jury's attention—by way of argument by defense counsel or an instruction from the court—as a means of responding to the State's showing of future dangerousness.

Id. at 177 (O'Connor, J., concurring in the judgment).[15]

The Court confronted a similar scenario in *Skipper* The defendant there had been convicted of capital murder and rape. In closing argument at sentencing, the State asserted that, based on evidence of the defendant's alleged jail misconduct, he would "pose disciplinary problems if sentenced to prison and would likely rape other prisoners." 476 U.S. at 4. This remark followed on the heels of the State's

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15. Twice since *Simmons*, this Court has granted certiorari and reversed death sentences on account of South Carolina's failure to adhere to *Simmons*. In *Shafer v. South Carolina*, 532 U.S. 36 (2001), the Court observed that "South Carolina has consistently refused to inform the jury of a capital defendant's parole eligibility status," even when required to do so after *Simmons*. *Id.* at 48. The Court rejected the State's contentions that *Simmons* was inapplicable to a new sentencing scheme, and that the jury had, in any event, been properly instructed on the defendant's parole eligibility status. *Id.* at 50-52. In *Kelly v. South Carolina*, 534 U.S. 246 (2002), the State presented evidence at sentencing in support of imposition of the death penalty (i) that defendant was a sadist with an "inclination to kill anyone who rubbed him the wrong way," and (ii) that while jailed, defendant had made a weapon and "taken part in an escape attempt even to the point of planning to draw a female guard into his cell where he would hold her hostage." *Id.* at 249. After the State presented this evidence, defendant sought an instruction under *Simmons* that he was ineligible for parole. The State objected, claiming that *Simmons* was inapplicable because the State had not placed defendant's future dangerousness at issue and was not going to argue future dangerousness in its summation; the trial court declined to give the instruction. *Id.* In its close, the State proceeded to call defendant a "butcher," "Bloody Billy," and "Billy the Kid"; to describe him as "quick-witted"; and to say "[d]oesn't that make someone a little more dangerous." *Id.* at 249-50. Defendant objected to the State's close, but the objection was overruled and the trial court again refused to give an instruction on parole ineligibility. *Id.* at 250. In reversing the death sentence, this Court held that the State had in fact raised future dangerousness both in its presentation of evidence and in its close, and that therefore, under *Simmons*, the jury should have been instructed on parole ineligibility. *Id.* at 252-57.

successful effort to bar, as irrelevant, the introduction by the defendant of evidence of his good behavior in jail to show that he would not present a threat to prison security if the death sentence was not imposed. *Id.* at 3-4.

This Court overturned the death sentence in *Skipper* on both Eighth Amendment and due process grounds. *Id.* at 4-5 & n.1. With respect to due process, the Court observed that the prosecutor's closing argument, which "urged the jury to return a sentence of death in part because the defendant could not be trusted to behave if he were simply returned to prison," underscored the relevance of evidence of the defendant's good conduct in jail that the trial court had excluded. *Id.* at 5 n.1. The Court concluded that

> Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only [the Eighth Amendment] that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain.

Id.; *see id.* at 10 (Powell, J., concurring in the judgment) (due process was violated because Petitioner was "not permitted to deny or explain evidence" of his behavior in jail "on which his death sentence may, in part, have rested," and "[t]his error was aggravated by the prosecutor's closing argument, which emphasized and exaggerated Petitioner's misconduct. . . .").

The State's tactics in this case mirror the State's conduct that was held to violate due process in *Simmons* and *Skipper*. After successfully advocating that the trial court exclude all evidence of third-party guilt that Petitioner sought to introduce, the State in its closing argument trumpeted that Petitioner's failure to present evidence of third-party guilt proved that he was guilty. In particular, the prosecutor exclaimed: "If you are going to frame them (sic) and it's

going to be Bobby Holmes, where is the raping, murdering, beating fellow that did this thing." (Tr. 4220.) This tracks the State's practice that was condemned in *Simmons* and *Skipper*. In all three cases, the trial courts, at the State's urging, blocked the defense from presenting evidence on a critical issue—the petitioners' dangerousness in *Simmons* and *Skipper*, and the identity of the perpetrator here. And in all three cases, the State exploited those evidentiary rulings by highlighting, in closing argument, the absence of the evidence the State sought to suppress as a basis to sentence the defendant to death (*Simmons* and *Skipper*) or to find him guilty (this case). In sum, review is warranted because the State's remarks in its close on an evidentiary void that the State itself created cannot be squared with the holdings in *Simmons* and *Skipper* that due process guarantees capital defendants an opportunity to rebut assertions made by the State in summation about critical evidentiary issues on which guilt or innocence, or life and death, may turn.

The South Carolina Supreme Court declined to address the constitutionality of the State's comments on the lack of evidence of third-party guilt during closing argument. Instead, in a cryptic one-sentence parenthetical, it said that Petitioner had not preserved the issue because his counsel failed to lodge a "contemporaneous objection" to those comments. (Pet. App. at 15a.) It is difficult to ascertain what state procedural rule the South Carolina Supreme Court was applying. Apparently, the court was saying that defense counsel must interrupt a prosecutor's closing argument and object at the exact moment of the offending comment, instead of waiting until the end of the close, as Petitioner's counsel did. Assuming that this is the procedural rule that was applied, it does not furnish adequate grounds for this Court to deny review of the State's remarks in its closing argument on the absence of evidence of third-party guilt.

This Court repeatedly has admonished that, while "failure to comply with a state procedural rule may constitute an independent and adequate state ground barring [this Court's] review of a federal question[,] a state

procedural ground is not adequate unless the procedural rule is strictly or regularly followed. State courts may not avoid deciding federal issues by invoking procedural rules that do not apply evenhandedly to all similar claims." *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982). That principle applies here. Simply put, the South Carolina Supreme Court has not consistently required defense counsel to interrupt prosecutors in the middle of their closing argument in order for objections to be deemed contemporaneous.

In some cases, the South Carolina Supreme Court has indicated that a defendant's objection to statements in the prosecutor's closing argument only need be sufficiently contemporaneous such that, if the objection is sustained, the trial judge has time to give a curative jury instruction. *See, e.g., State v. Tucker*, 478 S.E.2d 260, 267 (S.C. 1996); *State v. Patterson*, 482 S.E.2d 760, 766 (S.C. 1997); *State v. McIver*, 120 S.E.2d 393 (S.C. 1961). These cases are in keeping with the South Carolina Supreme Court's pronouncement in contexts other than closing argument that the purpose of the contemporaneous objection requirement is to afford "the trial judge an opportunity to cure any alleged error." *State v. Pauling*, 470 S.E.2d 106, 109 (S.C. 1996); *see State v. Torrence*, 406 S.E.2d 315, 327 (S.C. 1991) ("A contemporaneous objection requirement . . . allows potential errors to be prevented or cured.").

To be sure, in at least one case, the South Carolina Supreme Court has suggested that criminal defendants must interpose an objection to a statement in the prosecutor's closing argument immediately after the statement is made, instead of waiting for the conclusion of the close. *See State v. Rabon*, 272 S.E.2d 634, 635-36 (S.C. 1980). But even in that case, the court indicated that the purpose of the contemporaneous objection requirement is to call the offending statement in the closing argument to the trial judge's attention "such that a corrective instruction, if needed, may be given." *Id.* at 636.

All told, the procedural rule apparently invoked by the South Carolina Supreme Court has not been strictly or regularly followed by that court; thus, it imposes no barrier to this Court's review of the serious due process issue generated by the State's close. Rather, the test is whether the trial court had time to cure the error before the case was submitted to the jury. That standard was met here. In objecting to the State's emphasis on the absence of third-party guilt evidence as soon as the State finished its close, Petitioner's counsel gave the trial court a chance to cure the error before the case was submitted to the jury. (Pet. App. 28a.) Petitioner's counsel expressly requested a mistrial so that Petitioner could be afforded an opportunity to present such evidence in order to rebut the State's comment. *Id.* The trial court denied that request. Alternatively, Petitioner's counsel requested that the trial court issue a curative instruction regarding the comment. (Pet. App. 29a.) The trial court denied that request as well, and did not even instruct the jury to ignore the comment. (Pet. App. 30a.)[16] In short, for purposes of satisfying the procedural requirement that objections be made in a timely manner so that trial judges have an opportunity to take curative steps before sending the case to the jury, it would have made no difference if Petitioner's counsel objected in the middle of the State's close, rather than at the end of it.

16. The trial court gave only a general instruction that arguments by counsel that were unsupported by the evidence were to be disregarded. (Pet. App. 29a-30a.) In applying that instruction, however, jurors likely would conclude that the evidence to be considered would include the absence of evidence of third-party guilt to which the State referred in its closing argument. Thus, the instruction did not cure the error stemming from the State's reference.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA FILED NOVEMBER 1, 2004

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

Bobby Lee Holmes,

Appellant.

Opinion No. 25886
Heard February 19, 2004 - Filed November 1, 2004

AFFIRMED

JUSTICE MOORE: Appellant was convicted[1] of murder, first degree burglary, first degree criminal sexual conduct (CSC), and robbery. He received a death sentence for the murder, the jury having found three statutory aggravating circumstances,[2] and received three concurrent

1. This was appellant's second capital trial. His direct appeal from the first trial was affirmed, *State v. Holmes*, 320 S.C. 259, 464 S.E.2d 334 (1995), *cert. denied*, 517 U.S. 1248, 116 S.Ct. 2507, 135 L.Ed.2d 197 (1996); appellant was subsequently granted a new trial on post-conviction relief.

2. The aggravating circumstances were murder during the commission of burglary, murder during the commission of CSC, and physical torture.

sentences for the other offenses.[3] Appellant alleges errors occurred in both the guilt phase and the sentencing phase of his trial. We affirm appellant's convictions and sentences.

FACTS

At approximately 6:15 a.m. on December 31, 1989, the eighty-six-year-old victim opened her door in response to someone's knocking. A black male forced his way into her apartment, beat her about the chest and head, and demanded money. The man forced the victim into her bedroom where he ripped off her nightgown and anally raped her. He took $40 from her purse and left the apartment after ripping the living room phone from the wall.

At 7:45 a.m., the victim's friend (Mrs. Thrasher) phoned to check on the victim. After six or seven rings, the victim answered and told Mrs. Thrasher she had been beaten, anally raped, and robbed. Mrs. Thrasher called another friend, Mrs. Byers, who had an automobile and a key to the victim's apartment. Mrs. Byers went to the apartment, noticed it was messy, spoke with the victim who told her the assailant was "big and dark," and then drove to the police department since the living room phone had been pulled off the wall.[4]

The first officer on the scene was Dale Edwards. The victim told him that around 6 or 6:30 a.m. she heard knocking

3. The imprisonment terms were life for burglary; thirty years for CSC; and fifteen years for robbery.

4. The victim apparently answered Mrs. Thrasher's call using her bedroom phone.

at her front door and that when she opened the door, a black male forced his way in. She had taken a shower before the police arrived. Officer Edwards removed the sheets and pillowcase from the bed for use as evidence, and placed the items in a paper grocery bag taken from the victim's kitchen. Lt. Barnett arrived and assisted in the evidence collection. A pink nightgown, a housecoat, and a rag were removed from the bathroom and placed in another grocery bag. The victim gave Officer Edwards a pink paper towel with blood on it that he placed in a manila envelope brought to the scene by Captain Mobley, the third officer on the scene.

While the three police officers were there, two paramedics arrived to transport the victim to a local hospital emergency room. Blood samples were taken, but a rape kit was not processed because the victim was complaining of hip pain and medical personnel were awaiting X-rays before performing the exam. The blood testing kit used to take samples from the victim had "expired" several months earlier.[5] Before the victim's mental state began to deteriorate, she described her attacker to an emergency room nurse as a black male in his late twenties. On February 19, 1990, the victim was transferred to a nursing home where she died in March. The cause of death was pneumonia, which developed as the consequence of her severe brain injury.

5. Appellant includes the use of an expired kit in his argument that the forensic evidence was compromised. There was evidence, however, that the expiration date is a manufacturer's "guess" as to how long the vacuum in the blood collection vials will remain good, and that the kit can be used after that date if the vacuum remains effective.

Captain Mobley testified he arrived at the victim's apartment as the EMS personnel were transporting her out the door. He took custody of the evidentiary items from Officer Edwards and Lt. Barnett. He sent Officer Edwards door to door in the neighborhood and instructed Lt. Barnett to go to the hospital and speak with the victim.

Lt. Barnett recorded the victim's statement at the hospital emergency room before she became confused. She described her attacker's clothing: "a dark jacket, must have been blue or black, must have been black;" "a pair of those funny looking pants ... not the old pant, but something that's kind of mixed up you know;" his hair: "kind of long. Not too long, but a little longer than you usually wear it;" she then said: "he was middle aged. He was young. He was not too young. And he, as I remember, his hair was not short or not too long." The victim described her attacker as dark skinned, "not too heavy. Not too slim."

Later that day, Officer Edwards talked to several of the victim's neighbors. Ms. Boyd told him she heard knocking at her door about 3 a.m.; Mr. Lynn, who lived next door to the victim, reported knocking between 5:30 a.m. and 6:30 a.m.; and Ms. Diggs, who lived on the other side of the victim, heard someone knocking on her door around 6 or 6:30 a.m.

Officer Grady Harper testified he was dispatched to an apartment complex near the victim's residence at about 4:43 a.m. on December 31, 1989. A number of people, including appellant, were making a disturbance, and Officer Harper told them to quiet down and move on. Appellant was unruly, and Officer Harper called for back-up to assist in arresting

appellant. When the additional officers arrived, appellant ran. Officer Harper saw appellant get into a car; Officer Harper gave chase in his patrol car. The driver stopped the car and appellant ran from it. The last time Officer Harper saw appellant was about 5:30 a.m. and the other officers were chasing appellant. One of the "chasing" officers testified he lost sight of appellant at about 5:20 a.m. Appellant was wearing a black sweater with a hood and blue jeans.

Captain Mobley testified that after Officer Edwards and Lt. Barnett left the victim's apartment; he locked the front door and began processing the scene. He seized one more paper towel, the telephone touched by the assailant, and the victim's purse. He then dusted the apartment for fingerprints. On the interior side of the front door he photographed and lifted a palm print located slightly above the doorknob. Captain Mobley also photographed and lifted a print from the outside of the front door. The inside palm print was later identified as that of appellant.

Appellant was arrested on the afternoon of December 31, 1989, at his father's home in York, and denied ever having been inside the victim's apartment. When the police arrived, appellant was wearing a black hooded sweatshirt, underwear, and socks. He dressed in jeans before being transported by the police. While he was dressing, Officer Boot Smith noticed a tank top that appeared to have blood on it and asked if the police officers could take it. Appellant consented and stated the blood came from a fight he had been involved in the night before at a bar.

Appendix A

Forensic evidence linked appellant to the crime scene. In addition to the palm print found on the victim's door, the State introduced evidence that:

(1) fibers consistent with a black sweatshirt owned by appellant were found on the victim's bed sheets;

(2) a blue acrylic fiber was found on the victim's pink nightgown, and another on appellant's blue jeans: they "could have come from the same common source or it could have come from different sources, but indeed they do ... match each other;"

(3) microscopically consistent fibers were found on the pink nightgown and, in the form of a "fiber pill," on appellant's underwear;

(4) appellant's underwear contained a mixture of DNA from two individuals and 99.99% of the population other than appellant and the victim were excluded as contributors to that mixture; and

(5) appellant's tank top was found to contain a mixture of his blood and the victim's blood.

The defense theory was two-fold. First, it sought to discredit the forensic evidence by showing the evidence was mishandled and by demonstrating the many opportunities for contamination because of unprofessional errors. The defense also sought to suggest that the alleged contamination was not merely the result of simple negligence, but part of a plot on the part of certain law enforcement officers to see that

Appendix A

appellant was convicted of these crimes. In connection with this prong of the defense strategy, appellant sought to introduce evidence of third party guilt.

ISSUE

Whether the circuit court erred by refusing to admit evidence of third party guilt?

DISCUSSION

At a pretrial hearing, appellant proffered evidence of third party guilt. Specifically, he sought to introduce evidence at trial that the crimes were actually committed by Jimmy McCaw White (Jimmy).

1. *Pre-trial testimony*

Like appellant, Jimmy is a black male. At the time of the victim's murder, he was twenty-two years old; appellant was eighteen. Jimmy's hair was longer than appellant's and Jimmy had lighter skin than appellant.

Several witnesses placed Jimmy in the victim's neighborhood near 6 a.m. on December 31, 1989. Frenetta Johnson testified she saw Jimmy going toward the apartments where the victim lived between 4:30 and 5:30 a.m. Later in her testimony, she narrowed the time to "from four-thirty to something to five." Meshelley Gilmore testified she observed Jimmy in an apartment parking lot as she drove away from her home at about 3:30 or 4 a.m., and that he was still there when she returned at 4:30-4:45 a.m. These apartments were

near the victim's complex. Mrs. Gilmore was awakened by a police officer knocking on her door at 7:30 a.m. She told him she had seen Jimmy hanging around the parking lot earlier that morning.

Deloris Brown testified she saw Jimmy walking down the victim's street in the direction of the victim's apartment between 4 and 5 a.m. on December 31, 1989. Eighty-seven-year-old Anna Boyd, a resident of the same apartment complex as the victim, testified that someone knocked on her door during the night of December 30-December 31. The knocker said, "Open the door, my man, this is Jimmy, open the door." These are appellant's "proximity" witnesses.

Appellant also presented several witnesses who testified that Jimmy had acknowledged that appellant was "innocent" or to whom Jimmy had admitted his guilt. Thomas Murray testified that Jimmy said he knew appellant was innocent, and that he (Jimmy) could not be brought to court for it. Ken Rhodes testified he asked Jimmy whether the word on the street, that Jimmy was the victim's murderer, was true and that Jimmy "put his head down and he raised his head back up and he said well, you know, I like older women .... and he never called the lady's name but you know he say that he liked old women and that yeah he did what they say he did and you know that somebody else was locked up for it. And you know it's like he didn't have no regrets about it at all." Rhodes went on to testify that "[Jimmy] didn't say exactly what he done, he just told me that she had some good stuff ... He said that he didn't kill the lady. The lady was alive when he left...."

Mattie Mae Scott testified that in October 1997 she was at her son's house when Jimmy came to visit. Jimmy was "partially intoxicated," and when the others began talking about the 'old lady in York' that Jimmy had raped and murdered, Jimmy said, "Yes, I did it but [appellant] is going to fry for it."

The defense's "star witness" was Stephen Westbrook.[6] He testified that in 1990 and again in 1994 Jimmy told him he had broken into the victim's house and raped her. Jimmy told Westbrook that Officer Boot Smith[7] had told Jimmy to keep quiet about his guilt. Westbrook further testified that Officer Smith and Investigator Potts came to see Westbrook before appellant's first trial and offered to get him out of jail if he would testify that appellant had confessed to him. Westbrook testified that in June 2000, about two months before this pretrial hearing, he was brought to Rock Hill from Kirkland Correctional Institute. In Rock Hill, he was confronted by several employees of the solicitor's office who sought to convince him to testify against appellant in the upcoming second trial. Westbrook stated that the solicitor's office employees acknowledged to him that they had manufactured underwear evidence incriminating appellant. Westbrook also testified that Jimmy told him that Officer Smith was out to "frame" appellant, and that even appellant's former attorney had urged him to testify against appellant. Finally, Westbrook testified an employee of the solicitor's

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6. Westbrook's credibility was called into question by cross-examination and by impeachment.

7. Boot Smith was deceased at the time of this trial.

office stated that, in addition to the manufactured underwear evidence, they had lifted one of appellant's palm prints from the county jail door to use against him at trial. These are appellant's "confession" witnesses.

Further, the defense called a witness who testified that when asked why he would not confess, Jimmy told him "it's all over and done with and [appellant] is going to do the time for it."

The former receptionist at the York Public Defender's Office testified that Jimmy brought up the crime in conversation with her one day, and remarked that he did not believe appellant was guilty, that maybe Jimmy knew who did it, and that everybody on the street knew.

Finally, the defense called Jimmy to testify at the pretrial hearing. The trial judge instructed Jimmy he had the right to remain silent and the right to an attorney, and warned Jimmy that anything he chose to say could be used against him. Jimmy declined the offer of an attorney and opted to testify. Jimmy testified he left York and was home in Sharon by 2 a.m. on December 31, 1989. He claimed to have ridden with Junior Lytle. Lytle, however, testified at the pretrial hearing and denied driving Jimmy home to Sharon that night. Jimmy denied telling Stephen Westbrook that he had raped and killed the victim and denied confessing in the presence of Thomas Murray or John Dixon or telling the York Public Defender's receptionist that he knew who killed the victim.

2. *Standard for admitting third party guilt*

We have held that a defendant seeking to present evidence of third party guilt must meet this standard:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.

State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) (citing 16 C.J. 560).

The *Gregory* court went on to cite from 20 Am. Jur. 254:

> But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is

> on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.

Id., 198 S.C. at 104-105, 16 S.E.2d at 535. Further, in *State v. Gay*, 343 S.C. 543, 541 S.E.2d 541 (2001), we held that where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence.

Appellant fails to meet the standard set out in *Gregory* and *Gay* due to the strong evidence of his guilt. He simply cannot overcome the forensic evidence against him to raise a reasonable inference of his own innocence. This evidence included: (1) appellant's palm print was found just above the door knob on the interior side of the front door of the victim's house; (2) fibers consistent with a black sweatshirt owned by appellant were found on the victim's bed sheets; (3) matching blue fibers were found on the victim's pink nightgown and on appellant's blue jeans; (4) microscopically consistent fibers were found on the pink nightgown and on appellant's underwear; (5) appellant's underwear contained a mixture of DNA from two individuals, and 99.99% of the population other than appellant and the victim were excluded as contributors to that mixture; and (6) appellant's tank top was found to contain a mixture of appellant's blood and the victim's blood.[8]

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8. Although appellant claims the forensic evidence was mishandled and therefore was inadmissible, the fact the forensic evidence may have been compromised by the unprofessional manner (Cont'd)

Further, besides the forensic evidence, there was evidence that appellant matched the description of the perpetrator given by the victim and there was evidence that appellant was fleeing from police officers and was in the area of the victim's house prior to the time she was attacked.

Regarding appellant's claim that he should have been allowed to present evidence that Jimmy White may have been the perpetrator of the crimes, the State proffered the testimony of a Federal Bureau of Investigations forensic examiner. This examiner testified that, after testing Jimmy White's specimen,*i.e.* a dried bloodstain, and comparing the specimen to the clothing items that were tested as part of the investigation, White was excluded.

Given the overwhelming evidence of appellant's guilt, the circuit court did not err by excluding the evidence of third party guilt.

(Cont'd)
in which the evidence was collected goes to the weight of the evidence, not to its admissibility. *See State v. Carter*, 344 S.C. 419, 544 S.E.2d 835 (2001) (weak links in chain of custody go to weight, not admissibility); *State v. Smith*, 326 S.C. 39, 482 S.E.2d 777 (1997) (storage of blood sample in police officer's home goes to weight of evidence not its admissibility). In any event, appellant's claims do not eviscerate all of the forensic evidence. For example, appellant's claims do not eliminate the fact that consistent fibers were found on both his clothing and the victim's clothing and sheets or the fact that 99.99% of the population other than appellant and the victim were excluded as contributors to the mixture found in appellant's underwear.

CONCLUSION

Appellant's remaining issues are without merit and we dispose of them pursuant to Rule 220(b), SCACR. *See Issue I: State v. Council*, 335 S.C. 1, 515 S.E.2d 508, *cert. denied*, 528 U.S. 1050, 120 S.Ct. 588, 145 L.Ed.2d 489 (1999) (whether juror is qualified to serve on death penalty case is within discretion of trial court and is not reviewable on appeal unless wholly unsupported by the evidence; responses of challenged jurors must be examined in light of entire voir dire); *Issue IV: State v. Johnson*, 338 S.C. 114, 525 S.E.2d 519, *cert. denied*, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000) (appellate court will not disturb trial court's ruling concerning scope of cross-examination of a witness to test his or her credibility absent manifest abuse of discretion); *see also State v. Beckham*, 334 S.C. 302, 513 S.E.2d 606 (1999) (trial court erred by not admitting impeachment evidence after officer denied he had investigated two suspects different from the defendant; however, error found to be harmless); *Issue VI: State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1996), *cert. denied*, 520 U.S. 1268, 117 S.Ct. 2441, 138 L.Ed.2d 201 (1997) (contemporaneous objection required to preserve issue for appellate review); *Issues VII and VIII: State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999), *cert. denied*, 529 U.S. 1025, 120 S.Ct. 1434, 146 L.Ed.2d 323 (2000) (capital defendant may present as mitigating evidence (1) any aspect of defendant's character or record and (2) any circumstances of the crime that may serve as a basis for a sentence less than death); *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994), *cert. denied*, 513 U.S. 1166, 115 S.Ct. 1136, 130 L.Ed.2d 1096

(1995)[9] (residual doubts are not a mitigating factor in sentencing); *Issue IX: Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (properly administered the business and public records exceptions are among the safest against a Confrontation Clause challenge of the hearsay exceptions); Rule 1006, SCRE (contents of voluminous records may be presented in form of a summary provided underlying data are admissible into evidence); *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683, *cert. denied*, 519 U.S. 1045, 117 S.Ct. 618, 136 L.Ed.2d 541 (1996) (prison disciplinary records admissible under Uniform Business Records as Evidence Act, S.C.Code Ann. § 19-5-510 (1985)); *Issue XI: Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (victim impact evidence is admissible in a capital sentencing proceeding); *Neill v. Gibson*, 278 F.3d 1044 (10th Cir. 2001), *cert. denied*, 537 U.S. 835, 123 S.Ct. 145, 154 L.Ed.2d 54 (2002) (no *ex post facto* violation in allowing victim impact evidence when crime occurred in 1984); *Issue XII: State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1996), *cert. denied*, 520 U.S. 1268, 117 S.Ct. 2441, 138 L.Ed.2d 201 (1997) (contemporaneous objection required to preserve issue for appellate review); *Issue XIII: State v. Stroman*, 281 S.C. 508, 316 S.E.2d 395 (1984) (party cannot complain of error which his own conduct has induced); *Issue XV: State v. Weik*, 356 S.C. 76, 587 S.E.2d 683 (2002), *cert. denied*, 539 U.S. 930, 123 S.Ct. 2580, 156 L.Ed.2d 609 (2003) (issues cannot be raised for the first time on appeal); *State v. Saltz*,

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9. *Overruled on other grounds by State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995).

346 S.C. 114, 551 S.E.2d 240 (2001) (admission of evidence is in trial court's discretion and will not be disturbed on appeal absent an abuse of discretion).[10]

Proportionality Review

Under State law, S.C.Code Ann. § 16-3-25(C)(3) (1985) requires this Court to determine in a death case "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." There is no requirement the sentence be proportional to any particular case; however, death sentences have been imposed in similar cases. *See State v. Simmons*, 360 S.C. 33, 599 S.E.2d 448 (2004); *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274, *cert. denied*, 531 U.S. 882, 121 S.Ct. 197, 148 L.Ed.2d 137 (2000); *State v. Council*, 335 S.C. 1, 515 S.E.2d 508, *cert. denied*, 528 U.S. 1050, 120 S.Ct. 588, 145 L.Ed.2d 489 (1999); *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683, *cert denied*, 519 U.S. 1045, 117 S.Ct. 618, 136 L.Ed.2d 541 (1996). Accordingly, appellant's sentence is not disproportionate under State law. The judgment of the circuit court is

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10. As for Issue XIV, appellant's argument is based upon a factual error. Appellant argues the trial court erred by permitting the State to cross-examine a social worker using records from his stay in Gilliam Psychiatric Hospital in 2000. However, the trial court in fact denied the State's request to cross-examine the social worker and the State did not ask any questions regarding the 2000 Gilliam records. Because the Record on Appeal does not support appellant's assertion, we do not address his argument. *See State v. Sinclair*, 275 S.C. 608, 274 S.E.2d 411 (1981) (where appellant obtained only relief he sought, this court has no issue to decide).

AFFIRMED.

TOAL, C.J., WALLER, J., and Acting Justice JOHN W. KITTREDGE, concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent, and would find the circuit court erred in refusing to allow appellant to introduce evidence of third party guilt in the guilt phase of the trial. I would therefore reverse and remand for a new trial.

The majority and I agree on the third party guilt evidence proffered by appellant. In my view, the proffer met the standard established by *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941). The majority, relying on *State v. Gay*, 343 S.C. 543, 541 S.E.2d 541 (2001), concludes that the third party guilt evidence was properly excluded. I find *Gay* distinguishable.

In *Gay*, the Court affirmed the exclusion of evidence of third party guilt because the State's case, particularly the forensic evidence, was so strong that it admitted of no "reasonable inference" regarding the defendant's innocence. The present case is distinguishable from *Gay* in several important particulars. First, the validity of the forensic evidence was not called into question in *Gay*. Here, appellant presented evidence of mishandling, for example the collection of evidence at the scene using grocery bags from the victim's kitchen, the mislabeling of samples at the lab, and the loss of all blood samples collected from the victim. Further, appellant proffered evidence that representatives of

the State had admitted manufacturing blood and palm print evidence against him. Finally, unlike the defendant in *Gay*, appellant proffered both "proximity" witnesses and " confession" witnesses. Considering the record as a whole, the State's evidence was not sufficient to negate the "reasonable inference" of appellant's innocence arising from appellant's proffer.

I would reverse and remand for a new trial.

APPENDIX B — ORDER OF THE COURT OF GENERAL SESSIONS, SIXTEENTH JUDICIAL CIRCUIT DATED AUGUST 23, 2000

IN THE COURT OF GENERAL SESSIONS SIXTEENTH JUDICIAL CIRCUIT

#90-GS-46-1196, 1197, 1198, 1200

STATE OF SOUTH CAROLINA

COUNTY OF YORK

STATE OF SOUTH CAROLINA,

PLAINTIFF,

v.

BOBBY LEE HOLMES,

DEFENDANT.

ORDER
RE: THIRD PARTY GUILT EVIDENCE

Defendant seeks admission of evidence he claims tends to prove another guilty of the murder of Mary Stewart for which he is charged in the above set forth indictments. Defendant has presented on this issue testimony by a number of witnesses he claims bring this proffered evidence within the guidelines of the *State v. Gregory*, 198 S.C. 98, 16 S.E. 2d 532 (S. Ct. 1941).

Appendix B

In *Gregory* our Supreme Court established the criteria for admission of third party guilt evidence. *Gregory* sets forth this rule as follows:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends to clearly point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty. (16 S.E.2d at 534)

The defendant's witnesses establish to the Court's satisfaction that sufficient evidence exists from which a jury may conclude a third party, Jimmy McCaw White was in the

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proximity of Mary Stewart's home near the time the State asserts she was beaten and raped. See testimony of Renata Jamison, Neshelly Gilmore and Delores Brown. (The Court finds Annie Boyd's testimony insufficient to place Jimmy McCaw White in the area at the time).

The defendant presented Joshua Lytle to rebut Jimmy McCaw White's testimony that he rode to Sharon with Lytle hours prior to the purported time of the beating and rape. The Court finds this evidence supports the testimony of the three "proximity" witnesses set forth above. Additional, it shows that Jimmy McCaw White's testimony is subject to impeachment on this issue (i.e. his being at home in Sharon at the time of the crime) if he were to be called as a witness at trial.

The defendant presented testimony by John Dixon and Nancy Bennett, which does not amount to a confession by Jimmy McCaw White as the party guilty of the murder of Mary Stewart. The testimony of Thomas Murray, Steven Westbrook, Mattie Mae Scott and Ken Rhodes do rise to the level of testimony from which one could conclude Jimmy McCaw White has admitted in the presence of these witnesses tht he beat and raped Mary Stewart.

Defendant presented a theory on motive for Jimmy McCaw White being the guilty party, that motive being his "fixation" with "other women". The testimony does not rise to the level to establish this as a propensity of Jimmy McCaw White with the possible exception of Ken Rodes' testimony, which marginally could be taken as evidence of a penchant for older women by Jimmy McCaw White.

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Jimmy McCaw White testified he did not commit the crime Defendant is charged with in the above set forth indictment.

At first blush, the above arguably rises to the *Gregory* standard. However, the "engine" that drives the train" in this *Gregory* analysis is the "confessions" by Jimmy McCaw White. Such "confessions" are, of course, hearsay. In order for Mr. Holmes to put the engine on the track, these hearsay "confessions" must be admissible as declarations against penal interest under rule 804(b)(3), South Carolina Rules of Evidence. Admissions under this Rule when offered to exculpate an accused, must be corroborated by evidence clearly indicating the trustworthiness of the statement. *State v. Kinloch*, 338 S.C. 385, 526 S.E. 2d 705 (Sup. Ct. 2000). *State v. Forney*, 321 S.C. 353, 468 S.E. 2d 641 (Sup. Ct. 1996) and *Stae v. Doctor*, 306 S.C. 527, 413 S.E. 2d 36 (Sup. Ct. 1992).

Here, Defendant bears a "formidable burden" in meeting the Rule's requirements (*Kinloch*, 526 S.E. 2d 706) and Defendant's presentation does not meet this burden. Thus the train's engine is not on track and the train cannot travel into and through this case. The evidence here presented pales in comparison to that excluded in *Forney*, and in *Forney* the declarant was in fact a co-defendant and Forney testified as to the witness being present at the shooting of Officer McCants and named his co-defendant as the triggerman (468 S.E. 2d at 644). The evidence presented by Defendant falls woefully short of that in *Doctor*. In *Doctor* all three minor defendents had related identical version of the crime and three witnesses saw the stolen car being occupied by the witnesses

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whose statements against penal interest were offered without Doctor in the car.

Here, as in Forney, there is no independent evidence corroborating Jimmy McCaw White's alleged statements that he committed the beating and rape of Mary Stewart. As the Supreme Court observed in reference to *Forney* in the Court's opinion, in *Kinloch*, for the statements to rise to the level of trustworthiness, there should be "independent evidence corroborating the *declarant's* claim" (Emphases added, 526 S.E. 2d at 707). Additionally, at the time of the alleged statement in the presence of Mattie Mae Scott, Jimmy McCaw White was, according to her, "intoxicated." (See *Kinloch* regarding statements by those under the influence of drugs).

None of the proffered testimony contains evidence, absent the statement itself, which would link Jimmy McCaw White to the crime other than information that from all the testimony appears to have been common knowledge, i.e. an "old women" had been beaten and raped in the early morning hours and that Defendant had been tried, convicted and sentenced to death for the crime. None of Jimmy McCaw White's staement contain details of the crime and no forensic evidence has been offered linking Jimmy McCaw White to the crime. White's alleged statements are general in nature and his presence in the general area during the time period in which the crime is alleged to have occurred, does not corroborate his alleged "confessions".

Exclusion of the alleged statements of Jimmy McCaw White, will leave not only the engine missing from the train, but results in there be absolutely no facts or circumstances

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which clearly point to Mr. White or anyone else as the person guilty of the beating and rape of Mary Stewart. This being the case, the *Gregory* analysis ends here and Defendant's motion to present evidence of Third Party Guilt is DENIED.[1]

IT IS SO ORDERED.

s/ John C. Hayes, III #5
John C. Hayes, III
Presiding Judge

August 23, 2000
York, South Carolina

---

1. Defendant argues in his brief that Jimmy McCaw White's statements may be used to impeach his testimony. As to how Mr. White would even be on the stand in this trial is only by convolution addressed in Defendant's brief. Impeachment of any witnes will be a matter to be dealt with at trial. (Save the Court's prior rulings regarding Defendant's prior record). If Mr. White does have relevant testimony such as to be a witness at trial, the issue of impeachment is deferred to that time should it occur.

APPENDIX C — ORDER OF THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA DENYING PETITION FOR REHEARING DATED DECEMBER 1, 2004

December 1, 2004

Acting Deputy Chief Attorney Wanda P. Hagler
Office of Appellate Defense
1205 Pendleton Street, Rm. 306
Columbia, SC 29201

Re: The State v. Holmes, Bobby Lee

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.
s/ James E. Moore J.
s/ John H. Waller, Jr. J.
Justice E. C. Burnett, III, not participating

I would grant rehearing.

s/Costa M. Pleicones J.

December 1, 2004."

The remittitur is today being fowarded to the lower court.

Very truly yours,
s/ [illegible]
CLERK

APPENDIX D — PRESERVATION OF CONSTITUTIONAL CHALLENGE BY PETITIONER TO STATE'S CLOSING ARGUMENT AT TRIAL COURT DATED MARCH 23, 2001

* * *

Mr. Pope:

I would ask that you take the evidence that you have. It's been a long week. I would ask that you go back, consider the evidence, as you told us that you would, and return a verdict that speaks the truth. And the truth of the matter is that Ms. Stewart was raped. She was burglarized. She was robbed and she was killed. It's some the most evil malice in his heart by this man right there.

I appreciate your attention and I ask you to render justice. Thank you.

THE COURT: All right. We will take a break before we move forward. This won't be a smoke break. It's just a refresher break.

(The following takes place outside the presence of the jury panel)

THE COURT: We will reconvene in about five minutes, or so.

MR. MACDOUGALL: Could I ask the court's indulgence?

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THE COURT: All right. Let's stay -- we hadn't stopped yet. Everybody sit back down.

Let's don't sit back down.

MR. POPE: Ladies?

MR. MACDOUGALL: I would just like to confirm, Your Honor, the text of the court's instructions on lost and destroyed evidence and circumstantial evidence, so that they are not misstated in summary. May I do that now?

THE COURT: Yes, I do. And as to the lost, I am charging just the language that I believe counsel asked for, leaving out the word further; that is, there was a sentence' there on page 689 that started further. I'm going to leave out the word further and charge "when a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party."

MR. MACDOUGALL: All right. Thank you.

THE COURT: And as to the circumstantial evidence, I am going to charge down to the language the third line up from the bottom of the indented part. It says "evidence in this case," period, and that's where I'm going to stop. Picked up "after the weighing all the evidence," but stopping between the period -- the period before the word after.

And then I'm going to pick up under footnote 13, which is actually from another case I have got written up there, and instead of saying "the jury may not convict the defendant,"

I'm going to say "you may not convict the defendant," and then conclude.

MR. MACDOUGALL: All right., thank you Your Honor.

THE COURT: We'll take --

MR. NETTLES: Your Honor, briefly may I put two issues on the record?

I have been told by -- I didn't catch it. -My understanding is that Mr. Pope posed the question to the jury where is the other guy at one point during his closing. And if that's the case, I think that the third-party guilt information that has been fought for is extremely relevant.

In addition, I would point out that that is burden shifting, and I would ask the court for a mistrial.

* * *

Mr. Nettles:

And, Your Honor, furthermore, I would point out that one of the reasons that it was ruled that it couldn't come in was because it wasn't relevant. Well, he made it relevant. You know, one of the -- one of the cornerstones of the court's ruling was that this evidence is just not relevant. Well, now it is. And so -- and, you know, it's pretty easy for him to make it relevant.

I'll pose the question this way, Your Honor. If during the case, if the solicitor had elicited evidence that made it relevant, the court would have then allowed us to put it up. If he would have during cross or asked a series of questions that made it all of the sudden relevant, we would be bringing in, you know, three or four witnesses that we have got that Jimmy White confessed to doing it.

He made it relevant. He shifted the burden back on us and we are supposed to enjoy not having that burden. And he's done that, Your Honor.

I think that to go forward would be a violation of due process and the Fifth Amendment -- it would be a due process of the amendment -- due process violation, compulsory process violation right to present an adequate defense. It would be a fair trial violation, in that to, on the one hand, deny us the opportunity to put up evidence, and then to allow the State to pose questions that they know we can't answer. And all of that is given to us by State Constitution as well, Your Honor. Thank you very much.

* * *

The Court:

I am going to give, on my own, a curative instruction. It's very general. It might be covered by what I'll say anyway, but I am going to instruct the jury that "arguments of attorneys are not evidence. Any statement that was made by any counsel that is not supported by the evidence must be disregarded. You are restricting your deliberations to the evidence

presented in this trial. I will tell you," again -- or "I will tell you about the State's burden and the presumption of innocence inures to Mr. Holmes' benefit in my charge." I'm not going to tell them that at this time. I'm going to wait and tell them that when I do my charge.

* * *

MR. NETTLES: Your Honor, obviously we would respectfully object to the charge that the court has proposed. We would like to propose a charge to the jury.

* * *

THE COURT: Bring in the jury.

MR. NETTLES: Your Honor, am I correct that the curative instructions you plan on giving is what you are going to -- I apologize.

You're going to read it in the charge? And it's clear that we have objected to that. We asked for a mistrial of the jury instruction at the time and a motion of the case.

THE COURT: Yes, I think the record is clear on that.

* * *

Supreme Court, U.S.
JUN 1 6 2005
OFFICE OF THE CLERK

No. 04-1327

In The

Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

vs.

STATE OF SOUTH CAROLINA ,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of South Carolina

Respondent's Brief In Opposition

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Capital Case

PETITIONER'S QUESTIONS PRESENTED

In South Carolina, a criminal defendant's evidence of third-party guilt is inadmissible if, when comparing this evidence standing alone against the prosecution's evidence, the trial court finds that it fails to create a reasonable inference of innocence. In making this comparison, if the trial court finds the prosecution's evidence - and especially its forensic evidence - to be "strong", third-party guilt evidence is per se inadmissible because it is deemed, as a matter of law, to be insufficient to "overcome" the prosecution's evidence so as to create a reasonable inference of innocence.

1. Whether South Carolina's rule governing the admissibility of third-party guilt evidence violates a criminal defendant's constitutional right to present a complete defense grounded in the Due Process, Confrontation, and Compulsory Process Clauses?

2. Whether a capital defendant is denied due process when a prosecutor successfully moves for the exclusion of third-party guilt evidence and then, in closing argument, urges the jury to find the defendant guilty because of the absence of such evidence?

RESPONDENTS COUNTER QUESTIONS ON CERTIORARI

1 Is Certiorari Permitted Under 28 U.S.C. Section 1257, When The Federal Constitutional Claims Raised In The Petition Were Never Presented To The South Carolina Supreme Court On the Admissibility of Third Party Culpability Evidence in the Guilt Phase of the Trial and the Petitioner Asserted In That Court That The *Gregory-Gay* Test Was Appropriate. .

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A. *The Constitutional Issues Raised In The Petition Are Not Preserved For This Court's Jurisdiction.* 3

II. The Court should not grant certiorari to fashion general evidentiary rules on the admission of third party culpability evidence under the guise of the federal constitution. 6

III. The South Carolina Supreme Court's Application Of Its State Evidentiary Standard In Denying the Admission of Third Party Guilt Evidence Concerning Jimmy McCaw White Was Appropriate Where The Evidence Did Not Rise To The Level of Trustworthiness Necessary To Establish Its Admissibility Where the Proffered Evidence Did Not Raise A Reasonable Inference or Presumption As To His Own Innocence. 9

IV. Where the Petitioner Failed to timely object to the prosecutor's comments is not preserved for certiorari review by this Court. 24

1. The failure to timely object to the challenged comment properly precluded appellate review and further precludes certiorari consideration. 26

2. The comments do not "so infect the trial with unfairness as to make the resulting conviction a denial of due process." 28

CONCLUSION 30

TABLE OF AUTHORITIES

FEDERAL CASES

Apprendi v. U.S., 530 U.S. 466 (2000 24

Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 73 . . . 24

In Re Winship, 397 U.S. 358 (1970 24

Adams v. Robertson, 520 U.S. 83 (1997) (per curiam) 5

Blystone v. Pennsylvania, 494 U.S. 299, 309 (1990) 8

Bowe v. Scott, 233 U.S. 658, 664-65 (1914) 5

Chambers v. Mississippi, 410 U.S. 14, 19 (1973) . . . . . passim

Chambers v. Mississippi, 410 U.S. 284 (1973) 3, 12-14

Coleman v. Thompson, 501 U.S. 722 (1991) 27

Crane v. Kentucky, 476 U.S. 683 (1986) 3, 11

Doyle v. Ohio, 426 U.S. 610 (1976) 29

Griffin v. California, 380 U.S. 609 (1965) 29

Harris v. Reed, 489 U.S. 55, 262 (1989) 27

Henry v. Mississippi, 379 U.S. 443 (1965) 28

Herb v. Pitcairn, 324 U.S. 117 (1945) 27, 28

Herndon v. Georgia, 285 U.S. 441 (1935) 5

Howell v. Mississippi, — U.S. —, 125 S.Ct. 856, 160 L.Ed.2d 873 (2005) (per curiam) 5

Donnelly v. DeChristoforo, 416 U.S. 637 (1974) 28, 29

Marshall v. Lonberger, 459 U.S. 422 (1983) 8

Michigan v. Lucas, 500 U.S. 145, 149 (1991) 12

Montana v. Egelhoff, 518 U.S. 37 (1996) 14

New York Central R. Co. v. New York, 186 U.S. 269 (1902) 5

Oxley Stave Co. v. Butler County, 166 U.S. 648, 655 6

Patterson v. New York, 432 U.S. 197 (1977) 8

Payne v. Tennessee, 501 U.S. 808 (1991) 8

Rock v. Arkansas, 483 U.S. 44 (1987) 12

Romano v. Oklahoma , 512 U.S. 1 (1994) 8

Simmons v. South Carolina, 512 U.S. 154 (1994) 28

Skipper v. South Carolina, 476 U.S. 1 (1986) 28

Sochor v. Florida, 504 U.S. 527 (1992) 27

Spencer v. Texas, 385 U.S. 554 (1967) 9

Taylor v. Illinois, 484 U.S. 400 (1988) 12

United States v. Mackey, 117 F.3d 24, 28-29 (1st Cir. 1997) 22

United States v. Salvador, 820 F.2d 558, 561 (2d Cir. 1987) 22

United States v. Scheffer, 523 U.S. 303) 12-15

Washington v. Texas, 388 U.S. 14 (1967) 12

Webb v. Webb, 451 U.S. 493 (1981) 5

STATE CASES

Commonwealth v. Scott, 564 N.E.2d 370 (Mass. 1990) 7

Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998) 29

People v. Arline, 13 Cal. App. 3d 200, 203 (Cal. Ct. App. 1970) .. 7

People v. Conlogue, 474 A.2d 167, 172 (Me. 1984) 7

People v. Hall, 718 P.2d 99, 104 (Cal. 1986) 7

State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976) 28

State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) 15, 23

State v. Black, 319 S.C. 515, 462 S.E.2d 311 (Ct.App.1995) 26

State v. Browning, 154 S.C. 97, 151 S.E. 233 (1930) 29

State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990) 28

State v. Chaffee, 285 S.C. 1, 328 S.E.2d 464 (1984) 28

State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999) .. 15, 17, 21, 22

State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992) 15, 17, 22

State v. Forney, 321 S.C. 353, 468 S.E.2d 641 (1996) 17, 22

State v. Franklin, 318 S.C. 47 (1995) 26

State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001) 2, 4, 10, 16

State v. Giguere, 439 A.2d 1040, 1043 (Conn. 1981) 7

State v. Gregory,198 S.C. 98, 16 S.E.2d 532, 534 (1941).....passim

State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994) 26

State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995) 1

State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996) 25, 27

State v. Kinloch, 338 S.C. 385, 526 S.E.2d 705, 706 (2000) . 16, 22

State v. Koedatich, 548 A.2d 939, 978- 79 (N.J. 1988) 7

State v. McDonald, 343 S.E.2d 319 , 540 S.E.2d 464 (2000) ... 22

State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000) 16

State v. McIver, 238 S.C. 401, 120 S.E.2d 393 (1961) 26

State v. Parker, 294 S.C. 465, 366 S.E.2d 10 (1988) 15, 16

State v. Patterson, 324 S.C. 155, 169, 478 S.E.2d 260 (1997) ... 28

State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997) 26

State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996) 29

State v. Posey, 269 S.C. 500, 238 S.E.2d 176 (1977) 29

State v. Primus, 341 S.C. 592 29

State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980) 27

State v. Shackelford, 228 S.C. 9, 88 S.E.2d 778 (1955) 29

State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998) 26

State v. Williams, 266 S.C. 325, 223 S.E.2d 38 (1976) 26

Varnadore v. Nationwide Mut. Ins. Co., 289 S.C. 155, 345 S.E.2d 711 (1986) 26

FEDERAL STATUTES

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OTHER AUTHORITIES

Michael Everhart, *Putting a Burden of Production on the Defendant Before Admitting Evidence that Someone Else Committed the Crime Charged: Is It Constitutional?*, 76 Neb. L. Rev. 272, 293-94 (1997) 8

Admissibility Of Evidence Offered By A Criminal Defendant To Suggest That Someone Else Is Guilty, 63 Tenn. L.Rev. 917, 919-938 (1996) 7

OPINIONS BELOW

The opinion of the South Carolina Supreme Court (Pet. App. 1a-18a) is reported at 605 S.E.2d 19. The order of the South Carolina Court of General Sessions (Pet. App. 19a-24a) is unreported.

JURISDICTION

The South Carolina Supreme Court's judgment was entered on November 1, 2004. A timely petition for rehearing was denied on December 1, 2004 (Pet. App. 25a). The jurisdiction of this Court is allegedly invoked under 28 U.S.C. § 1257(a). For reasons set forth below, Respondents submit that this Court lacks jurisdiction in portions of Question I and the all of Question II.

RESPONDENT'S STATEMENT OF THE CASE

1. The Trial and Prior Proceedings.

The Petitioner, Bobby Lee Holmes, is currently a safekeeper in the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court for York County. Holmes was indicted at the February 26, 1990 and March 9, 1990 terms of the Court of General Sessions for York County for the crimes of murder, burglary in the first degree, criminal sexual conduct in the first degree, and robbery involving the December 31, 1989 beating of Ms. Mary Stewart resulting in her death on or about March 10, 1990. (90-GS-46-1196-1198). The matter was initially called for trial on April 13, 1993 The jury found the Petitioner guilty of all charges on April 17, 1993. On April 19, 1993, the jury returned a verdict finding the statutory aggravating circumstances and recommended the death sentence. Holmes was sentenced to death. The Supreme Court of South Carolina affirmed the convictions and death sentence. State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995). Certiorari was denied by the United States Supreme Court. Holmes v. State of South Carolina,, 517 U.S. 1248 (U.S. S.Ct. June 10, 1996).

State postconviction relief was subsequently granted directing a new trial be held. *Holmes v. Moore, 96-CP-46-966, Order (January 15, 1998)*. In that proceeding, Holmes was represented by John H. Blume, current counsel of record before this court for Amicus Curiae "Certain Professors of Evidence Law."

The matter was called for a new trial on March 12, 2001. The jury found Holmes guilty of robbery, burglary in the first degree, criminal sexual conduct in the first degree and murder. ROA 4350.

On March 28, 2001, the jury found the existence of three aggravating circumstances: murder was committed while in the commission of criminal sexual conduct, murder was committed while in the commission of during the commission of burglary, and murder was committed while in the commission of physical torture. ROA 5737-38. The jury recommended the death sentence. ROA 5738. Holmes was sentenced to 15 years concurrent on robbery, thirty years concurrent on criminal sexual conduct in the first degree, life imprisonment concurrent for burglary in the first degree and death penalty for murder. ROA 5749-5750.

2. The Instant Appeal

The Petitioner made an appeal to the South Carolina Supreme Court from the second conviction. In this appeal, pertinent to this appeal, he raised issues as to whether the circuit court had erred in refusing to admit proffered evidence that the crimes were committed by Jimmy McCaw White. See *Final Brief of Appellant*. p. v. Statement of Issues on Appeal, II-VIII. The South Carolina Supreme Court affirmed the conviction and death sentence on November 1, 2004. State v. Holmes, 361 S.C. 333, 605 S.E.2d 19 (2004). On the issue of the admission o the evidence in the guilt phase, the Court concluded that pursuant to the standards state evidentiary law on the admission of evidence of third party guilt set out in State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) and State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001) that evidence of third party's guilt did not raise reasonable inference as to defendant's innocence and thus was not admissible. On the issue

concerning the prosecutor's guilt phase closing argument comments, the South Carolina Supreme Court summarily held that the failure to contemporaneously object at the time of the comments precluded appellate consideration.

3. Statement of the State's Factual Case

The South Carolina Supreme Court summarized the facts of the crime. These are set out in the appendix to the petition at 2a-7a. This portion of the opinion is incorporated herein by reference.

REASONS WHY CERTIORARI SHOULD BE DENIED

I. Since The Federal Constitutional Claims Raised In The Petition Were Never Presented To The South Carolina Supreme Court On the Admissibility of Third Party Culpability Evidence in the Guilt Phase of the Trial and the Petitioner Asserted In That Court That The *Gregory-Gay* Test Was Appropriate, Certiorari Is Not Authorized Under 28 U.S.C. Section 1257.

Holmes initially contends that certiorari is warranted because the treatment of rejecting the proffered third party guilt evidence involving Jimmy White *in the guilt phase* as a matter of state evidentiary law conflicts with the Court's jurisprudence to allow a defendant to present a complete defense, citing Crane v. Kentucky, 476 U.S. 683 (1986) and Chambers v. Mississippi, 410 U.S. 14, 19 (1973). For the various reasons set forth below, we submit that certiorari is not warranted.

A. *The Constitutional Issues Raised In The Petition Are Not Preserved For This Court's Jurisdiction.*

The Petitioner asserts, for the first time, that the state court evidentiary standard of State v. Gregory, 198 S.C. 98, 165 S.E.2d 532 (1941) violates this Court's mandates in Chambers v. Mississippi, 410 U.S. 284 (1973) because it allegedly creates a *per se* exclusion of 3rd party guilt evidence where the prosecution case is

"strong." This constitutional challenge to the existing state evidentiary test was never raised in *any* challenge to the guilt phase evidence before the Supreme Court of South Carolina. In fact, Chambers and its progeny were never cited in the Final Brief of Appellant on the guilt phase issues where they relied solely on reference to state evidentiary law and rules to support the admission. See *Final Brief of Appellant*, pp. 7-30, *Final Reply Brief of Appellant*, pp. 5-19.[1] In fact, the Appellant claimed that State v. Gregory was the appropriate test for the court to consider the admission of this evidence. *Final Brief of Appellant, pp. 9, 18, 30. Final Reply Brief of Appellant*, p. 10. Also, the Appellant cited the decision of State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001) in support of their position on admissibility. *Final Brief of Appellant*, pp. 17, 19; *Final Reply Brief of Appellant*, pp. 9. Conclusively, in the petition for rehearing before the Supreme Court, the petitioner again stated that the evidence was admissible under "the Gregory and Gay standard." *Petition for Rehearing*, p. 2. **No particular reference was made to any federal constitutional violation concerning the *Gregory-Gay* standard in the guilt phase arguments in the appeal.**

Since the Petitioner contended that the *Gregory - Gay* analysis was the appropriate guilt phase evidentiary standard in the state court, he has not preserved his right to assert these matters de novo before this Court.[2] These belated assertions by Petitioner before this Court present new constitutional claims which were not

---

[1] The only guilt phase argument to any non-South Carolina evidentiary cases was a passing reference to Chambers in a footnote in the *Reply Brief of Appellant, p. 10, n. 11.* In that setting, it was being cited which support for the corroboration requirement of SCACR Rule 804(b)(3), not as a challenge to state standard.

[2] Remarkably, the Petitioner and the amicus curiae chastise the Supreme Court of South Carolina for not citing Chambers in their guilt phase evidence analysis. A review of the petitioner's presentation on the guilt phase issues to the South Carolina Supreme Court similarly reveals that his entire argument was based upon a state law evidentiary analysis without reference to the constitutional issues he now presents.

presented below. As revealed in the *Final Brief of Appellant*, the guilt phase evidentiary issues raised were solely based upon state evidentiary law and its applicability to the various offers of third party guilt evidence suggested by Holmes. Now, for the first time, he attempts to suggests that Chambers mandates and further deprivations of his right to a jury trial and guilt beyond a reasonable doubt is implicated by the failure to admit the evidence. He never challenged the state standards for the admission of evidence of third party guilt as he does before this Court. At that time, he was asserting that he satisfied those standards, not that the standards themselves violated the federal constitution. Since his assertions raise new completely claims, never sought to be addressed in the South Carolina Supreme Court, they must be barred from certiorari consideration.

A mere conclusory reference in the Final Brief of Appellant to the Constitution is insufficient to preserve jurisdiction for certiorari in this Court. See, *Final Brief of Appellant*, pp. 19, 22, 26, 30, 36 . Herndon v. Georgia, 285 U.S. 441, 442-43 (1935); Bowe v. Scott, 233 U.S. 658, 664-65 (1914) ("due process of law" insufficient). In Howell v. Mississippi, --- U.S. ----, 125 S.Ct. 856, 160 L.Ed.2d 873 (2005) (per curiam), the Court concluded that petitioner's federal constitutional claim was not properly raised before the Mississippi Supreme Court for purposes of 28 U.S.C. § 1257 because "he did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases." Id. at 858. 28 U.S.C. Section 1257 requires that federal law challenges to state law decisions be "addressed by or properly presented" to the state court before the Supreme Court may hear the case. Id. at 860. See, e.g., Adams v. Robertson, 520 U.S. 83, 89, n. 3, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) (per curiam) (concluding that "passing invocations of 'due process' " that "fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment" do not "meet our minimal requirement that it must be clear that a federal claim was presented"); Webb v. Webb, 451 U.S. 493, 496, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981) (finding a reference to "full faith and credit" insufficient to raise a federal claim without a reference to the U.S. Constitution or to any cases relying on it); New York Central R. Co. v. New York, 186 U.S. 269, 273, 22 S.Ct. 916,

46 L.Ed. 1158 (1902) ("[I]t is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth"); Oxley Stave Co. v. Butler County, 166 U.S. 648, 655, 17 S.Ct. 709, 41 L.Ed. 1149 (1897) (a party's intent to invoke the Federal Constitution must be "unmistakably" declared, and the statutory requirement is not met if "the purpose of the party to assert a Federal right is left to mere inference"). The similar failure to meet these minimum standards by Holmes in the South Carolina Supreme Court bars consideration of his question presented here. [3]

II. The Court should not grant certiorari to fashion general evidentiary rules on the admission of third party culpability evidence under the guise of the federal constitution.

The Petitioner and the amicus curiae make a request for this Court to make uniform evidentiary standards for the admission of third party guilt evidence. They recognize that

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[3] The Respondents acknowledge that Holmes did make reference to Chambers in his presentation on the failure to admit the evidence in the penalty phase. *Final Brief of Respondents, pp. 38-43.* However, a review of the petition before this Court reveals the current issue is solely on the guilt phase evidence issue, not the penalty phase.

Further, Respondents submit that this court must ignore the belated attempt of the *amicus curiae* to reconstruct the issue to also argue the exclusion of the evidence in the penalty phase violates the Eighth Amendment. See *Brief of Amicus Curiae Certain Professors of Evidence, p. 2, n. 1.* Contrary to the assertions of the amicus, there is no argument or citation to the Eighth Amendment in the present petition for writ of certiorari before this Court. Furthermore, in representing the opinion of the Supreme Court in his Petition, Holmes makes no reference to the portion of the opinion which addressed the penalty phase issue or the conclusions of the South Carolina Supreme Court on that claim. See, *Petition, p. 14-15,* citing *Pet. App. at 11a-12a.*

courts apply varying standards to admission of this evidence. Some courts use the Federal Rule of Evidence Rule 401 or the state equivalent and the principal of relevancy to determine admissibility. Commonwealth v. Scott, 564 N.E.2d 370 (Mass. 1990)(upholding the exclusion of evidence that others committed the charged crime on relevancy grounds). Other use a "connection" test. See, e.g., People v. Arline, 13 Cal. App. 3d 200, 203 (Cal. Ct. App. 1970)(stating that there were no facts to "connect [the third party] with the crime"); State v. Giguere, 439 A.2d 1040, 1043 (Conn. 1981)("We have stated: 'Ordinarily, evidence concerning a third party's involvement is not admissible until there is some evidence which directly connects that third party with the crime.'"). See also State v. Koedatich, 548 A.2d 939, 978- 79 (N.J. 1988)(collecting state and federal cases admitting and excluding evidence based on the existence or nonexistence of a "link" or "connection" between the "third party and the victim or the crime"). Some use Rule 403 (the prejudice rule) to exclude such evidence, People v. Hall, 718 P.2d 99, 104 (Cal. 1986), while others use the balancing test in conjunction with a "critical and reliable conclusion. Others have adopted a "reasonable doubt test, People v. Conlogue, 474 A.2d 167, 172 (Me. 1984)(evidence tending to implicate another person, and deflect guilt from the defendant, must be admitted if it is of sufficient probative value to raise a reasonable doubt as to the defendant's culpability"); People v. Hall, 718 P.2d 99, 104 (Cal. 1986)("[T]hird party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt."). while others apply a combination of all three. State v. Caulk, 718 P.2d 99 (Cal.1986). See generally David McCord, *"But Perry Mason Made It Look So Easy!": The Admissibility Of Evidence Offered By A Criminal Defendant To Suggest That Someone Else Is Guilty*, 63 Tenn. L.Rev. 917, 919-938 (1996); Stephen Michael Everhart, *Putting a Burden of Production on the Defendant Before Admitting Evidence that Someone Else*

Committed the Crime Charged: Is It Constitutional?, 76 Neb. L. Rev. 272, 293-94 (1997) . They contend that this variety of tests breed confusion in the admission of the evidence, particularly when the state courts regularly do not cite any federal authority for their standards.

The argument, pared down, seems to be a request that the Court fashion general evidentiary rules, under the guise of interpreting the Due Process Clause, which would govern the admissibility of evidence at state criminal trials. The Supreme Court has not done so in the past, however, and should not do so today. The Federal Constitution does not establish a federal code of evidence to supersede state evidentiary rules in state court trials. Romano v. Oklahoma , 512 U.S. 1, 12 (1994) Cf. Payne v. Tennessee, 501 U.S. 808, 824-825 (1991); Blystone v. Pennsylvania, 494 U.S. 299, 309 (1990).

"[P]reventing and dealing with crime is much more the business of the States than it is of the Federal Government, and ... we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out,' ... and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " Patterson v. New York, 432 U.S. 197, 201-202, 97 S.Ct. 2319, 2322, 53 L.Ed.2d 281 (1977) (("[W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States"); Marshall v. Lonberger, 459 U.S. 422, 438, n. 6, 103 S.Ct. 843, 853, 74 L.Ed.2d 646 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules"). "It has never been thought that [decisions under the Due Process Clause] establish

this Court as a rule-making organ for the promulgation of state rules of criminal procedure." Spencer v. Texas, 385 U.S. 554, at 564 (1967).

Certiorari is not warranted to establish a uniform federal standards for the admission of third party guilt evidence in state court.

III. The South Carolina Supreme Court's Application Of Its State Evidentiary Standard In Denying the Admission of Third Party Guilt Evidence Concerning Jimmy McCaw White Was Appropriate Where The Evidence Did Not Rise To The Level of Trustworthiness Necessary To Establish Its Admissibility Where the Proffered Evidence Did Not Raise A Reasonable Inference or Presumption As To His Own Innocence.

In denying relief on this issue, the South Carolina Supreme Court stated:

> Appellant fails to meet the standard set out in *Gregory*[4] and *Gay*[5] due to the strong evidence of his

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[4] In the opinion, the South Carolina Supreme Court stated the following standard arises from its earlier holding in State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) (citing 16 C.J. 560):

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . .
>
> . . .But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts,

guilt. He simply cannot overcome the forensic evidence against him to raise a reasonable inference of his own innocence. This evidence included: (1) appellant's palm print was found just above the door knob on the interior side of the front door of the victim's house; (2) fibers consistent with a black sweatshirt owned by appellant were found on the victim's bed sheets; (3) matching blue fibers were found on the victim's pink nightgown and on appellant's blue jeans; (4) microscopically consistent fibers were found on the pink nightgown and on appellant's underwear; (5) appellant's underwear contained a mixture of DNA from two individuals, and 99.99% of the population other than appellant and the victim were excluded as contributors to that mixture; and (6) appellant's tank top was found to contain a mixture of appellant's blood and the victim's blood.. . .

Further, besides the forensic evidence, there was evidence that appellant matched the description of the perpetrator given by the victim and there was evidence that appellant was fleeing from police

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disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.

[5] The Holmes Court also cited the holding in State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001), that where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence.

officers and was in the area of the victim's house prior to the time she was attacked.

Regarding appellant's claim that he should have been allowed to present evidence that Jimmy White may have been the perpetrator of the crimes, the State proffered the testimony of a Federal Bureau of Investigations forensic examiner. This examiner testified that, after testing Jimmy White's specimen, i.e. a dried bloodstain, and comparing the specimen to the clothing items that were tested as part of the investigation, White was excluded.

Given the overwhelming evidence of appellant's guilt, the circuit court did not err by excluding the evidence of third party guilt.

State v. Holmes, supra. Respondents submit that this analysis did not "infringe upon a weighty interest of the accused."[6] Certiorari is not warranted.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting California v. Trombetta,

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[6]The trial judge held that he was going to disallow the testimony holding that it could not come in under SCRE Rule 803 (b)(3) and Rule 801(d)(1)(a). ROA 3655. Relying upon Gregory, the court held that the statement lacked trustworthiness because there was no evidence that tends to clearly point out that Mr. White was guilty of the crime. ROA 3655-56.In his earlier written order on August 23, 2000, the court noted that although he had presented some testimony that White was in the proximity of Mary Stewart's apartment at a time when the victim was beaten, the engine that "drives the train" under the Gregory standard of the White admissions fell short of the indicia of trustworthiness lacking any details and no forensic evidence links White to the crime. Supp. ROA p. 3-5.

467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)).A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. See Taylor v. Illinois, 484 U.S. 400, 410, 108 S.Ct. 646, 653- 654, 98 L.Ed.2d 798 (1988); Rock v. Arkansas, 483 U.S. 44, 55, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37 (1987); Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 1045-1046, 35 L.Ed.2d 297 (1973). A defendant's interest in presenting such evidence may thus " 'bow to accommodate other legitimate interests in the criminal trial process.' " Rock, supra, at 55, 107 S.Ct., at 2711 (quoting Chambers, supra, at 295, 93 S.Ct., at 1046); accord, Michigan v. Lucas, 500 U.S. 145, 149, 111 S.Ct. 1743, 1746, 114 L.Ed.2d 205 (1991). However, that right is not unlimited. "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) (quoting Rock v. Arkansas, 483 U.S. 44, 56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)) (emphasis added). "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, [evidentiary rules] may not be applied mechanistically to defeat the ends of justice." Chambers, 410 U.S. at 302, 93 S.Ct. 1038. The Supreme Court has "found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." Scheffer, 523 U.S. at 308, 118 S.Ct. 1261. See Rock, supra, at 58, 107 S.Ct., at 2712-2713; Chambers, supra, at 302, 93 S.Ct., at 1049; Washington v. Texas, 388 U.S. 14, 22-23, 87 S.Ct. 1920, 1924-1925, 18 L.Ed.2d 1019 (1967).

In Scheffer, the Court revisited the issue of balancing the defendant's right to present a defense against the state's right to prevent unreliable evidence. Scheffer held that a *per se* ban on polygraph evidence did not constrain unconstitutionally a defendant's right to present exculpatory evidence. 523 U.S. at 317, 118 S.Ct. 1261. Scheffer distinguished Washington and Rock. The Court noted that the exclusions of evidence in those cases "significantly undermined fundamental elements of the defendant's

defense." Id. at 315, 118 S.Ct. 1261. Specifically, Scheffer held that barring the admission of an allegedly exculpatory polygraph test did not do so, id. at 309, 118 S.Ct. 1261, and it contrasted the polygraph limitation with the preclusions on the testimony of a percipient witness and the testimony of the defendant, respectively, in Washington and Rock, id. at 315-16, 118 S.Ct. 1261. The distinction between Washington, Rock, and this case, on the one hand, and Scheffer, on the other, is this: In the former, a trial court prohibited presentation of the substantive content of a defendant's testimony or a percipient witness' testimony, id. at 315, 118 S.Ct. 1261, while in the latter a trial court prohibited something much less direct, and much more within the jury's province--third-party evidence of the truthfulness of the substantive content of the defendant's testimony, id. at 315-16, 118 S.Ct. 1261.

In Chambers v. Mississippi, 410 U.S. 284 (1973), the Court was confronted with a defendant's inability to introduce evidence that a third person had repeatedly confessed orally to committing the murder with which the defendant was charged. When Chambers was tried, the Mississippi Rules of Evidence did not recognize an exception to the hearsay rule for declarations against penal interest and adhered to the common law "voucher rule." The Supreme Court held that the exclusion of the evidence constituted a violation of the Due Process Clause of the Fourteenth Amendment. In Chambers, the Court explicitly noted that the third party's confessions "were originally made and subsequently offered at trial under circumstances that provided considerable assurances of their reliability." *Id.* at 300, 93 S.Ct. 1038. The third party confessed to three different individuals. The confessions were made spontaneously and to close acquaintances shortly after the murder occurred. The confessions were corroborated by substantial independent evidence. The declarant did not stand to benefit from disclosing his role in the murder, and the declarant was present in the courtroom and could have been cross-examined under oath. *Id.* at 300-01..

The Court briefly noted that a rationale for the rule against hearsay is to exclude untrustworthy testimony. *Id.* at 298, 93 S.Ct. 1038. Where the testimony bears persuasive assurances of

trustworthiness and the testimony is exculpatory in nature, the hearsay rule should "not be applied mechanistically to defeat the ends of justice." *Id.* at 302, 93 S.Ct. 1038. Accordingly, Chambers effectively held that stringent application of the rule against hearsay may violate fundamental standards of due process when the rule is applied mechanistically and in a manner precluding introduction of statements against penal interest that are both reliable and "directly affecting the ascertainment of guilt." *Id.*

The crux of Chambers is that a defendant has a fundamental right to present *reliable* evidence of a third party's confession to a crime for which the defendant is being tried. Evidence of a spontaneous confession by a third party that is corroborated by direct evidence satisfies a showing of "particularized guarantees of trustworthiness" and is sufficiently reliable to be admissible as an exception to the rule against hearsay.

The Petitioner maintains that he was denied the opportunity to present a defense pursuant to Chambers because hearsay evidence relating to an element of the State's case was excluded. The Petitioner, however, fails to recognize the limited application of Chambers articulated in subsequent Supreme Court decisions.

In Montana v. Egelhoff, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996), a plurality of the Court noted the limited application of Chambers by stating:

> the holding of Chambers-if one can be discerned from such a fact-intensive case-is certainly not that a defendant is denied "a fair opportunity to defend against the State's accusations" whenever "critical evidence" favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to a level of a due process violation.

Id. at 53, 116 S.Ct. 2013. The limitation on Chambers was subsequently confirmed by an eight-Justice majority, excluding Justice Stevens, in United States v. Scheffer, 523 U.S. 303, 118 S.Ct.

1261, 140 L.Ed.2d 413 (1998). In Scheffer, eight Justices agreed that "*Chambers* specifically confined its holding to the 'facts and circumstances' presented in that case." 118 S.Ct. at 1268.

Because it is clear that the application of Chambers should be limited to the facts of that case when applied to issues involving hearsay evidence, this Court would have to examine the facts of these cases. Chambers involved the impact of Mississippi's voucher rule. Such a *per se* exclusionary standard is not involved in this case where the reliability and corroboration of testimony was the touchtone of the state court analysis Gregory analysis. In Chambers , the Court went through numerous factors that supported persuasive assurance of trustworthiness concerning the hearsay statements. Similarly, where the South Carolina Supreme Court and trial court analyzed the case and resolved it against the strong evidence of guilt which the inadmissible evidence did not confront, the testimony was unreliable. This reasoned analysis is consistent with Chambers. The standard in South Carolina does not create a per se exception to third party guilt evidence, only an exception to unreliable evidence suggesting third party guilt. The failure to admit was not constitutional error.

A review of the case below reveals that the Petitioner's federal constitutional rights were not violated by the exclusion of the unreliable evidence.

ADMISSIBILITY OF EVIDENCE OF THIRD PARTY GUILT IN SOUTH CAROLINA

Evidence offered by a defendant as to the commission of the crime by another person is limited to facts which are inconsistent with the defendant's guilt .State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941); State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); State v. Parker, 294 S.C. 465, 366 S.E.2d 10 (1988). The South Carolina Supreme Court has imposed strict limits on the admissibility of third party guilt. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999); State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992). Before a statement against interest (offered to exculpate the accused) can be received into evidence, there must be such proof of

connection with it, such a train of facts or circumstances, as tends clearly to point out such person as the guilty party. State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000); State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). "The evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." "But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances as tends ***clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.*** An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is probably more guilty." Gregory, 198 S.C. at 104-05, 16 S.E.2d at 534-35 [emphasis added]; accord State v. Parker, 294 S.C. 465, 366 S.E.2d 10 (1988); State v. Kinloch, 338 S.C. 385, 526 S.E.2d 705, 706 (2000).

The Supreme Court of South Carolina has held that evidence of a third party's motive and opportunity to kill the victim is properly excluded where the appellant nonetheless fails to show that the proffered evidence is inconsistent with his guilt. State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001). In Gay, the State Supreme Court further found that given the strong evidence of guilt of the defendant - especially the forensic evidence - and the fact that the experts found that the samples, like here, did not match the alleged third party, the proffered evidence did not raise a "reasonable inference" as to the appellant's own innocence, citing Gregory , and simply was not inconsistent with the defendant's guilt.

Evidence of third party guilt may also be excluded if its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. See SCRE Rule 403.

In State v. Gregory, supra, the South Carolina Supreme Court sustained the exclusion of certain evidence of third party guilt, saying it did not sufficiently link a third person with commission of the crime involved, and because the collateral matter tended to confuse the jury. See SCRE Rule 403 (which cites Gregory in the annotations). See State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992) (out-of-court statements against penal interest made by an unavailable declarant are admissible at trial, however, if offered to exculpate the accused in a criminal trial, they are admissible only if corroborating evidence clearly indicates the trustworthiness of the statements). State v. Forney, 321 S.C. 353, 468 S.E.2d 641 (1996). Rule 804(b)(3), SCRE, codified this exception to the hearsay rule. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999).(A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement).

THE PROFFERED THIRD PARTY GUILT EVIDENCE MERELY CONSISTS OF "REMOTE ACTS, DISCONNECTED AND OUTSIDE THE CRIME ITSELF"

The Petitioner asserts that the trial court should have allowed certain evidence that Jimmy White (Jimmy McCaw White), and not Bobby Lee Holmes, raped and murdered Mary Stewart. As reviewed by the South Carolina Supreme Court, the proffered evidence does not withstand close analysis where the forensic evidence of his guilt does not raise a reasonable inference of his own innocence to allow the admission of this evidence.[7]

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[7] It should be noted that there is extensive forensic evidence linking Holmes to the crime scene and the victim. His palmprint was found at the victim's home on the interior of the door at the victim's apartment. ROA 2870, 2876-2883. Also fibers consistent with the victims' nightgown was found on the defendant's blue jeans and fibers consistent with the

Holmes has assembled a collection of small, conjectural inferences which attempt to bootstrap each other so as to create an appearance of voluminous evidence of the third party's guilt, thereby giving credence to a series obviously untrustworthy statements against interest purportedly made by Jimmy White.

As lengthy as the list may be, it does not come close to meeting the requirements for introduction of evidence of third party guilt. Individually or collectively, the items on Holmes' list which he asserts point to Jimmy White as Mary Stewart's killer do not offer facts inconsistent with Holmes' guilt and do not clearly point to the guilty of Jimmy White.

The State submits that the "train of facts" proffered by the defense purportedly to clearly point out Jimmy White as the guilty party constitute little more than "remote acts, disconnected and outside the crime itself."

Gilmore, Jamison, Brown and Boyd

Taking their testimony in the light most favorable to the defense, three of these witnesses put Jimmy White in the California Street/Pecan Circle area between 3:30 am and 5:30 am on the morning of December 31, 1989. Meshelly Gilmore, contrary to the defense's assertion of 6:30 am, testified that she saw Jimmy White between 3:30 am and 4:30 am in the Pecan Circle parking lot away from Mrs. Stewart's home. ROA p. 5925-5929. Frenetta Jamison saw him on the hill on California Street between 4:30 am and 5:30 am after returning from approximately 7½ hours of drinking at

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victim's bed clothing was found on his hooded jacket. ROA 2997. PCR DNA testing also showed that the Petitioner's underpants contained a mixture of DNA consistent with both the Petitioner's DNA and consistent with the victim's DNA . ROA 3527. Also, the Petitioner's shirt and a paper towel from the crime scene contained mixtures that the defendant and the victim could not be excluded from. ROA 3301-02, ROA 3526-30. It was also reported that the further testing of the material from the crime scene, the victim or the Petitioner excluded Jimmy White's DNA as a contributor. ROA 3306-07.

Clyde's. ROA 5910. Deloris Brown looks briefly out of her apartment window onto California Street between 4:00 am and 5:00 am and sees an individual she identifies as Jimmy White solely by the way he walked. ROA 6163. Annie Boyd says she does not know what time it was or who knocked and said "open the door Mama Ann, it's me Jimmy." None of the witnesses were able to identify the clothing of the individual. ROA 5984-88, 5990-91. Although this testimony is certainly suspect for the variety of reasons previously enumerated, even if completely credible as the court in its Order recognized, it does little more than place Jimmy White in the area prior to the crime. Such evidence is not inconsistent with Holmes' guilt in that none of this testimony precludes Holmes from actually being in Mrs. Stewart's home committing the assault while Jimmy White was merely in the neighborhood. Therefore, such evidence falls far short of raising a reasonable inference or presumption of Holmes' own innocence and would fall more closely into the area of conjecture of fanciful analogy.

Joshua Lytle

Based on Mr. Lytle's testimony, the defense attempts to prove that Jimmy White lied regarding his whereabouts at the time of the crime. However, Mr. Lytle believed that his April 7, 1990 statement was taken on December 31, 1989, the morning of the incident. ROA p. 5949-50. His own recollection of the events of the night was inconsistent with his statement. ROA 5950-61.

Nonetheless, taking the defense's view that Jimmy White lied about his alibi still has no other effect than to cast a bare suspicion on Jimmy White and even that is extremely tenuous. Again, as the trial court recognized this testimony does little more than support the proximity argument. Supp ROA 2-5.

Mrs. Stewart's Description of the Assailant

The defense has consistently maintained that Jimmy White fits the description better than Holmes based on hair length and age. However, it is equally clear that Holmes better fits the description when the criteria are skin tone, build and clothing description. Mrs.

Stewart described the assailant as "big and dark", "chunky""hair longer than most black people" wearing a dark "black or blue" jacket, "black" " a male in his late 20's. Such evidence provides no connection for the defense's "train of facts." ROA 2150, 2167-68, 2182-83, 2219-20, 2235.

Jimmy White's Alleged Confessions

When the defense's "train of facts" is distilled to its "bare," "remote", "conjectural", "fanciful" essence all that is left is a series of highly questionable quasi-confessions attributed to Jimmy White by a number of suspect witnesses. Under Rule 804, SCRE, Holmes cannot call these witnesses to testify concerning White's statements since White is available to testify. (See, also Cooper at 588). However, Holmes' reliance on Rule 613, SCRE is equally misplaced. Calling Jimmy White as a defense witness for the sole purpose of impeaching him through extrinsic proof of his prior statements is not appropriate under the holding in Cooper. Jimmy White has no relevance to this case other than as a backdoor means of interjecting third-party guilt. Therefore, any such testimony would be improper as substantive evidence of third party guilt and the Court properly excluded such evidence.

Holmes says Jimmy White "confessed" on a number of occasions to various people. An examination of these for the necessary clear indications of trustworthiness that the statements were actually said, and of the truth of the content (that Jimmy White killed Mary Stewart, not Bobby Holmes), would show a serious lack of credibility that they were actually spoken.

The witnesses Holmes has produced in support of the alleged "confessions" by Jimmy White exhibited a variety of characteristics which render their credibility extremely suspect. These included: 1.)denying statements made previously in sworn affidavits; 2) statements in sworn affidavits of events and meetings which were physically impossible; 3) deviations from earlier statements; 4)inherent biases, such as familial or close personal relationship with the defendant; 5)intoxication by the witness at the pertinent time; and 6) witnesses from the very small community of

York coming forward now, years after the crime and an earlier highly publicized trial, in such a way as to make their reliability extremely suspect. Under South Carolina Rules of Evidence 403 and 804(b)(3), as well as the South Carolina Supreme Court's holdings in Kinloch, Forney, and Gregory, this evidence of third party guilt was inadmissible.

On Stephan Westbrook, it was developed that the statements he gave contained numerous inaccuracies and was not true in parts and he even asserted at one point that he just signed the statement and had not read it. ROA p. 6024-25, 6032 - 34, 6059-62, 6067-68. It was developed that although he stated he knew Holmes "from around" that his family connections were so close that Holmes had put Westbrook's brother on his visitor list. ROA 6024-25, 6067-68. He acknowledged that in his statement and testimony he referred to different times. ROA 6079, 6084-91. Some of the circumstances he described were physically impossible since White was not in custody at the stated time. ROA 6081-82.

Thomas Murray clarified that he never heard White admit to the crime that Holmes was accused of. ROA p. 6397, 6399. He denied ever stating what was in the affidavit that knowledge of White committing the crime was widespread and puts him in trouble with other inmates. ROA. 6399. Murray denied other portions of his affidavit. He denied ever stating item 4 in the affidavit concerning about White framing Holmes for a dispute in York, because he did not know anything about it. ROA p. 6400-01. He also stated that he had spoken with Pope's office that and told them that no woman had ever notarized his signature on a statement. ROA p. 6408-09. Murray stated that White was just saying that he knew Bobby was innocent, but he never said he did it. Id. ROA 6409.

Mattie Scott stated that White comes to her house intoxicated and everyone starts talking about raping and killing, while they were "drinking and talking" among a group. ROA p. 6420.

Ken Rhodes admitted being good friends with Bobby Holmes since the mid eighties. ROA p. 6429, 6444. he stated that he

used to ride with Holmes. ROA p. 6445. He stated that he had also met his mother and father. ROA 6445-46. He had also known White his entire life. He stated that during the time with White alleged comments Rhodes described his incarceration history since 1993. ROA p. 6447-49. He stated the only person he had told was his wife. ROA p. 6449. However, at some point he received a call from Holmes lawyers. Id. However, there was never any testimony that involved this particular crime, only that White ran with older women. ROA 6454.

As stated previously, White denied ever admitting guilt to Westbrook, Murray, or Bennett. ROA p. 6129-30.

The statements against penal interest by the third party, Jimmy White, which Holmes is attempting to offer, lack the clear indications of trustworthiness that they were actually spoken as alleged. A determination of whether the trustworthiness of a declaration against penal interest offered to exculpate the accused is "clearly indicated" by corroborating circumstances includes not only the trustworthiness that the declaration was actually spoken, but also whether the trustworthiness of the content is clearly indicated. See State v. Kinloch, supra ("As neither the making of the statement nor its truth were clearly corroborated, we find no abuse of discretion in exclusion of Robinson's testimony."); State v. Forney, supra; State v. Doctor, supra. Compare, State v. McDonald, 343 S.E.2d 319 , 540 S.E.2d 464 (2000) ("...the corroboration requirement contained in Rule 804(b)(3) goes not to the truth of the statement's contents, but rather to the making of the statement. In many instances, it is not possible to separate these two considerations in analyzing the matter of corroboration...As a practical matter the two inquiries are related, ordinarily requiring the trial court to examine the content of the statements as part of its analysis of the totality of the circumstances.") See; United States v. Salvador, 820 F.2d 558, 561 (2d Cir. 1987) (corroborating circumstances must be strong, nor merely allowable); United States v. Mackey, 117 F.3d 24, 28-29 (1st Cir. 1997) (corroborating circumstances requirement not unrealistically severe, but goes "beyond minimal corroboration," and trial court has substantial discretion in finding on trustworthiness).

The South Carolina Supreme Court in State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999), upheld the denial of evidence of third party guilt. In Beckham, a murder case, the victim was killed on a roadway. The defendant attempted to introduce evidence that two men were on the roadway at the time of the murder. The Court said the evidence of the two men would not exculpate the defendant, and the exclusion of the evidence was not error. Beckham at 317.

Here, the trial court correctly found that the alleged statements of White, particularly the comments by Westbrook lacked the indicia of trustworthiness necessary to allow its admission as third party guilt as reliable evidence. As in Gay, there is strong evidence of guilt of the defendant - especially the forensic evidence - and the fact that the experts found that the samples, like here, did not match the alleged third party, the proffered evidence did not raise a "reasonable inference" as to the Petitioner's own innocence, Gregory , and simply was not inconsistent with the defendant's guilt.

None of the proffered testimony contains evidence, absent the alleged comment to Westbrook itself, which would link Jimmy McCaw White to the crime other than information that from all the testimony appears to have been common knowledge, i.e. an "old woman" had been beaten and raped in the early morning hours and that Holmes had been tried, convicted and sentenced to death for the crime. None of Jimmy McCaw White's statement contain details of the crime and no forensic evidence has been offered linking Jimmy McCaw White to the crime. White's alleged statements are general in nature and his presence in the general area during the time period in which the crime is alleged to have occurred, does not corroborate his alleged "confessions."

None of the alleged White statements given were presented in a manner to suggest any reliability or corroboration that they even occurred. The trial court did not abuse its discretion in disallowing the comment to be introduced. Here, because White's alleged statements bore no indicia of reliability. In Chambers, the declarant's statement was corroborated both by the circumstances of its making and by other evidence. 410 U.S. at 300, 93 S.Ct. 1038, 35 L.Ed.2d

297; see, also, Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738. In this case, Jimmy White's alleged comment were not corroborated at all by other evidence. The trial court did not err in excluding this information from the penalty phase of Holmes capital trial. The South Carolina Supreme Court's acknowledgment that Holmes failed to satisfy the *Gay-Gregory* standard due to the strong evidence of guilt is plainly supported by the record.

Contrary to conclusory statements, the Petitioner ignores the fact that the Gregory standard of admissibility test is not merely to the strength of the state's case, but to the showing of a "reasonable inference or presumption of his own innocence." In this setting, the forensic evidence uniquely tied Holmes to the case, including the six (6) factors specifically addressed in the opinion.

Holmes further contends that this somehow relieved the state of its burden of proof beyond a reasonable doubt, citing In Re Winship, 397 U.S. 358 (1970). Nothing in the standard for the admission of third party guilt evidence relieves the state of its burden of proof. To the contrary, it remains entirely on the state to show guilt beyond a reasonable doubt. The mere fact that incompetent evidence is not admitted by the defense does not undermine this burden. The fact that there is a burden of production placed upon the defendant for the admission of certain evidence does not create the risks Petitioner now associates with this standard. Further, equating this evidentiary standard with the deprivation of a jury trial of the facts under Apprendi v. U.S., 530 U.S. 466 (2000), is a remarkably stretch of the constitutional fabric. Nothing removes any factual proof the state must show to convict Holmes. His rhetorical suggestion otherwise must be rejected.

Certiorari must be denied for the various reasons set forth above.

IV. Where the Petitioner Failed to timely object to the prosecutor's comments is not preserved for certiorari review by this Court.

In his second argument, he asserts that the trial court erred in denying a *belated* motion for a mistrial when the prosecutor in his guilt phase closing argument commented , "if [Petitioner] didn't commit the crimes, that's one explanation...[who did it.", ROA 4215, ll. 8-9 and "if you are going to frame them and its going to be Bobby Holmes, where is this raping, murdering , beating fellow that actually did this thing?" ROA 4220, 4264. In summarily denying relief, the Supreme Court of South Carolina concluded that: "Appellant's remaining issues are without merit and we dispose of them pursuant to Rule 220(b), SCACR . . . *Issue VI:* State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996), *cert. denied,* 520 U.S. 1268, 117 S.Ct. 2441, 138 L.Ed.2d 201 (1997) (contemporaneous objection required to preserve issue for appellate review)." State v. Holmes, supra., 361 S.C. 344, 605 S.E.2d 24-25. In denying this issue on a well settled failure to timely object during the argument, the procedural bar established in the state court similarly precludes consideration in this Court.

How The Issue Was Untimely Raised In The State Court

Contrary to the assertions in the Petitioner's brief, there were no contemporaneous objections to the comments of the prosecutor as required under state law to preserve the issue for appellate review. It was only after the argument was completed that the defense made its objection to the particular comments for the first time that he had posed a question to the jury about third party guilt.

The prosecution requested the court to take the whole section in context. ROA p. 4240,ll 17-25. He asserted that it was a comment on the police work and whether they were attempting to frame Holmes, not on the Jimmy White issue, when taken in context. See also, ROA p. 4252, 4258-59.

The trial court noted that there was no contemporaneous objection to this statement for another challenge comment. ROA p. 4243, ll. 4-11. Counsel asserted he had failed to object, but it would not have made any difference concerning a potential curative instruction. ROA p. 4243.

The trial court held that the objection was not timely made and was not properly before the court. ROA p. 4264, ll. 8-13. The court further determined that the comment was made "in context of the officer's investigative work and matters dealing with looking at the investigative work and the case worked up the state." ROA p. 4264. He denied the motion for a mistrial. On appeal, applying state procedural law which was well established, the South Carolina Supreme Court similarly held this issue barred from consideration.

1. The failure to timely object to the challenged comment properly precluded appellate review and further precludes certiorari consideration.

The trial court found that it could not consider the matter due to a failure of the defense to contemporaneously object to the comment. The failure to timely object to comments made during the argument precludes appellate review of the issue. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997); State v. Franklin, 318 S.C. 47 (1995). The state trial court and appellate court correctly found this matter could not be considered due to the failure to timely object during the arguments as a matter of state procedure.

It is a fundamental principle that a contemporaneous objection is required at trial to properly preserve an error for appellate review in South Carolina . State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994) (to preserve error for appellate review, defendant must make contemporaneous objection on specific ground); State v. Black, 319 S.C. 515, 462 S.E.2d 311 (Ct.App.1995). The proper course to be pursued when counsel makes an improper argument is for opposing counsel to immediately object and to have a record made of the statements or language complained of and to ask the court for a distinct ruling thereon. Varnadore v. Nationwide Mut. Ins. Co., 289 S.C. 155, 345 S.E.2d 711 (1986); State v. Williams, 266 S.C. 325, 223 S.E.2d 38 (1976).

In State v. McIver, 238 S.C. 401, 120 S.E.2d 393 (1961), the court held that a defendant's objection made for the first time after the argument was completed and in a motion for a new trial was too

late. In State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980), the court held that a statement of prosecutor during closing argument to jury did not warrant reversal where defendant waited until argument had been completed to object to alleged impropriety. In then instant case, the South Carolina Supreme Court relied upon State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996), where the Court held that the appellant's failure to timely object during the argument to the same claim raised in the appeal precluded consideration of the claim. The Petitioner attempts to parse this procedural decision by the final arbiter of state procedure - the South Carolina Supreme Court - by alluding that the objection which came too late in Holmes case could have been preserved because the trial court had time to cure the error before the case was submitted to the jury. This, however, is not South Carolina practice. The trial court and the Supreme Court knew better about the demands of state practice.

Contrary to the claims of the Petitioner, a belated motion and objection after the completion of the argument does not preserve the issue. The late objection deprived the trial court of the opportunity to address the issue while the argument was ongoing and have the opportunity to address it in context. In depriving the court of this opportunity, the matter was not preserved.

In Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546, 2553, 115 L.Ed.2d 640 (1991), the Court reaffirmed that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." See also Harris v. Reed, 489 U.S. 55, 262, 109 S.Ct. 1038, 1042-1043, 103 L.Ed.2d 308 (1989). The Court has stated that it lacks jurisdiction to review such independently supported judgments on direct appeal: Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory. Herb v. Pitcairn, 324 U.S. 117, 125-126, 65 S.Ct. 459, 462-464, 89 L.Ed. 789 (1945); see also Sochor v. Florida, 504 U.S. 527, 533-534 (1992).

Since the matter was properly held to be barred as a matter of state procedure, certiorari consideration of this closing argument

issue is precluded due to lack of jurisdiction. Here, the state procedural bar is wholly independent of the federal ground. Henry v. Mississippi, 379 U.S. 443 (1965); Herb v. Pitcairn, 324 U.S. 117, 125 (1945). On this issue, the writ must be denied.

2. The comments do not "so infect the trial with unfairness as to make the resulting conviction a denial of due process."

Alternately, assuming this matter is procedurally preserved, this second issue does not demand certiorari where the comments did not cause unfairness to make the conviction a denial of due process. The Petitioner's reliance upon Simmons v. South Carolina, 512 U.S. 154 (1994) and Skipper v. South Carolina, 476 U.S. 1 (1986) is misplaced. In those cases, the Court found due process violations where there was a deprivation of his right to a fair rebuttal when he was barred from presenting competent and relevant evidence to explain the comments. Contrary to those settings, the failure to present competent and relevant evidence does not afford the Petitioner the opportunity to present evidence that fails evidentiary standards. Certiorari is not warranted here.

The general rule concerning closing arguments in South Carolina is that a solicitor must confine his arguments to the record and its reasonable inferences, State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990), but the failure to do so will not automatically result in a new trial. A new trial will only be granted where the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction or sentence a denial of due process. Johnson v. State, supra, Donnelly v. DeChristoforo, 416 U.S. 637 (1974), State v. Patterson, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1997). A "momentary lapse of good taste will rarely constitute prejudicial error." State v. Chaffee, 285 S.C. 1, 328 S.E.2d 464 (1984). The Court has also held that a solicitor has the right to state his version of the testimony and to comment on the weight to be given such testimony. Caldwell, supra, 300 S.C. at 504, 388 S.E.2d at 822, State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976). "A court should not lightly infer that a prosecutor intends an ambiguous remark to have is most damaging meaning or that a jury, sitting

through lengthy exhortation will draw that meaning from the plethora of less damaging interpretations." Donnelly, supra 416 U.S. 637, 646.

Where a defendant presents evidence at trial, the prosecutor may comment on the defendant's failure to present the testimony of seemingly accessible witnesses who are or should be aware of relevant information. Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998); State v. Shackelford, 228 S.C. 9, 88 S.E.2d 778 (1955).However, where the defendant produces no evidence on his behalf, it is improper for the prosecutor to comment on the defendant's failure to call a particular witness. See State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996); State v. Posey, 269 S.C. 500, 238 S.E.2d 176 (1977). The jury should ordinarily be instructed not to draw inferences from the neglect of a defendant to call witnesses. Douglas, supra.; State v. Browning, 154 S.C. 97, 151 S.E. 233 (1930).

The Petitioner asserts this remark about who did it if not Holmes and where is the person who killed the victim was a comment in violation of the Petitioner's right to require the state to prove his guilt beyond a reasonable doubt. In the state court, he cited Doyle v. Ohio, 426 U.S. 610 (1976) and Griffin v. California, 380 U.S. 609 (1965). This claim was not raised therein as a Due Process claim under either the Simmons or Skipper analysis which he now asserts for the first time.

As below, the Petitioner ignores the fact that he did, in fact present evidence in his defense and did in fact testify in his defense. ROA 3661-3708, 3751- 4072. Therefore, his reliance upon these cases do not apply to his claim. State v. Primus, 341 S.C. 592, 535 S.E.2d (2000). Simply put, there can be not Fifth Amendment error nor is their an improper shift in the burden of proof by these comments when the defense presented a defense to the action.

A prosecutor is allowed to state his version of the case. It is clear that throughout his argument, the prosecution was anticipating an argument that Holmes was "framed" or early on targeted as a

suspect.[8] It is also clear that he had failed to satisfy the requirements to bring forth reliable evidence of third party guilt. The question is not whether the Petitioner attempted to create such evidence for purposes of a prosecution argument limited to the record, the point of permissible argument is whether he was argument the permissible inferences from the record introduced to the jury. Solicitor Pope committed no error in his presentation. For these alternate reasons, the matter is without merit.

Respondents respectfully submit that this claim is without merit for certiorari. It must be dismissed for lack of jurisdiction where the same claim was not timely presented to the state court.

CONCLUSION

For all the foregoing reasons, certiorari must be denied.

Respectfully submitted,
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June 6, 2005

[8] See Testimony of Chief William Mobley where the prosecutor questions him on whether he planted evidence or sought to frame Holmes. ROA 2803-04.

(5)

No. 04-1327

IN THE

Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

REPLY BRIEF

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I. Review Of Petitioner's Constitutional Challenge To South Carolina's Approach To Third-Party Guilt Evidence Is Warranted.

A. Petitioner's Constitutional Challenge To South Carolina's Approach To Third-Party Guilt Evidence Was Preserved In The State Courts.

South Carolina's assertion that Petitioner never raised his federal constitutional challenge to South Carolina's approach to third-party guilt evidence in the state courts (Opp. at 3-6) is wrong. The trial record and Petitioner's briefs in the South Carolina Supreme Court show that Petitioner raised this challenge below, preserving the federal claim for this Court's review.[1]

Throughout trial, Petitioner sought to establish his Sixth and Fourteenth Amendment rights to present evidence of third-party guilt. First, in a pretrial brief urging the trial court to admit the evidence, Petitioner argued that he had a "constitutional right to present witnesses" who could testify to the guilt of Jimmy White because to "permit a jury to determine [Petitioner's] fate without weighing such evidence would . . . 'defeat the ends of justice.'" (Pet. Supp. App. 1a-2a [quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)].) Then, during the trial, when the court ruled that the third-party guilt evidence could not be introduced to impeach testimony of police officers with respect to the thoroughness of their investigation, Petitioner objected based on *Washington v. Texas*, 388 U.S. 14 (1967), one of the cases on which Petitioner relies in this Court (Pet. at 16, 17, 18). In particular, Petitioner argued that, under *Washington*, the exclusion of this evidence violated his constitutional rights to a fair trial, to present a complete defense, and to effective cross-examination. (Pet. Supp. App. 3a-4a.) Following the end of the State's case at the guilt phase, Petitioner requested reconsideration of the exclusion of third-party guilt evidence as part of his defense. In so doing, Petitioner argued that South Carolina's approach to third-party guilt evidence could "not be applied mechanistically" so as to violate his Fourteenth Amendment

[1] Petitioner has reproduced relevant portions of the trial record and his state supreme court briefs in a "Supplemental Appendix."

due process right to a fair trial. (Pet. Supp. App. 5a [quoting *Chambers*, 410 U.S. at 284].)

In his appeal to the South Carolina Supreme Court, Petitioner presaged the constitutional claims he is raising in this Court. Petitioner argued that the exclusion of the third-party guilt evidence was an "arbitrary misapplication of the hearsay rule" that "clearly violated" *Chambers*; an unconstitutional application of *State v. Gregory*, 16 S.E.2d 532 (S.C. 1941); a violation of Petitioner's "sixth amendment right to a jury trial"; a violation of Petitioner's federal constitutional right to be convicted beyond a reasonable doubt; and a violation of Petitioner's federal constitutional right "to present a complete defense." (Pet. Supp. App. 19a, 23a-24a.)[2]

The State misapprehends this Court's standards for assessing whether a federal claim was preserved in state court.[3] Under those standards, one is not required to cite "book and verse" in order to preserve a federal issue. *Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982). Indeed, as the Court admonished long ago on this score:

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record

---

[2] While these arguments appear under a heading of Petitioner's Final Brief that refers to errors at the penalty phase, the arguments themselves primarily address the constitutional violation that occurred at the guilt phase when Petitioner was barred from presenting evidence of third-party guilt. At any rate, Petitioner set forth his constitutional challenge to the exclusion of evidence of third-party guilt in three sections of his Final Brief that address errors in the guilt phase. At the end of each of those sections, Petitioner argued that the exclusion of that evidence was "in violation of the due process clause of the fifth amendment and in violation of the sixth, eighth and fourteenth amendments to the United States Constitution. . . ." (Pet. Supp. App. 10a-15a.) Furthermore, Petitioner's Final Reply Brief incorporated by reference the constitutional arguments with respect to the exclusion of third-party guilt evidence that Petitioner advanced in his Final Brief, and, in so doing, drew no distinction between exclusion of the evidence at the guilt phase and exclusion of the evidence at the penalty phase. (Pet. Supp. App. 28a.)

[3] The State does not argue that, as a matter of South Carolina rules of procedure, Petitioner failed to preserve his federal constitutional challenge to South Carolina's approach to third-party guilt evidence.

> as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928). Echoing this theme, the Court observed earlier this year that a party "can easily indicate the federal law basis for his claim in a state-court petition or brief . . . by citing in conjunction with the claim the federal source of law on which he relies." *Howell v. Mississippi*, 125 S. Ct. 856, 859 (2005). In short, so long as a specific right was claimed in state court, and the federal Constitution was relied on as the source of that right, the federal claim was preserved. *See, e.g., Eddings*, 455 U.S. at 113 n.9; *Beck v. Alabama*, 447 U.S. 625, 630 n.6 (1980); *Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972).

Petitioner plainly satisfied that standard. Both in the trial court and in the South Carolina Supreme Court, Petitioner made arguments on the constitutionality of the exclusion of third-party guilt evidence that were more than sufficient to preserve the federal claim for this Court's review.[4]

The cases on which the State relies are inapposite. In virtually every one, the petitioner's state court briefs failed to identify any federal constitutional provision as the source of the right to be vindicated. *Howell*, 125 S. Ct. at 859; *Webb v. Webb*, 451 U.S. 493, 496 (1981); *Herndon v. Georgia*, 295 U.S. 441, 442-43 (1935); *Bowe v. Scott*, 233 U.S. 658, 664-65 (1914); *New York C. & Hudson River R.R. Co. v. City of New York*, 186 U.S. 269, 272 (1902); *F.G. Oxley Stave Co. v. Butler County*, 166 U.S. 648, 653 (1897).[5]

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[4] While the South Carolina Supreme Court did not address Petitioner's federal constitutional challenge to the exclusion of the third-party guilt evidence he sought to introduce at trial, Petitioner's briefs afforded that court "a fair opportunity to address the federal question," thereby defeating any notion that the question was not presented below. *Adams v. Robertson*, 520 U.S. 83, 87 (1997).

[5] *Adams* lends no support to the State. In that case, petitioners sought review in this Court of a due process challenge to state court approval of a class action settlement that purportedly did not provide constitutionally sufficient opt-out rights to class members. This Court held that the challenge had not been preserved below because there, petitioners' arguments had focused on the due process rights of non-class members. *Id.* at 88-89. As the

(Cont'd)

B. Review Is Warranted To Delineate The Constitutional Parameters Of State Rules On Evidence Of Third-Party Guilt.

South Carolina asserts that Petitioner is asking this Court to do away with state rules on the admissibility of third-party guilt evidence and to impose uniform national rules. (Opp. at 7-8.) That is not so. The Petition seeks only clarification of the federal constitutional boundaries of state evidentiary rules on the admissibility of such evidence in the face of South Carolina's extreme (and unconstitutional) approach. (Pet. at 22-23.) Indeed, the differences nationwide between state rules (that South Carolina itself recognizes, Opp. at 7-8) only reinforce the need for clarification of those boundaries.[6]

Many states do not have a special rule governing the admissibility of third-party guilt evidence; instead, courts in these states determine whether such evidence is admissible by applying state versions of Federal Rule of Evidence 401, which provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."[7] Under this standard (in contrast to South Carolina's), the evidence of third-party guilt that Petitioner sought to introduce would have been admissible: the trial court found that this evidence was sufficiently credible to show that Jimmy White confessed multiple times to the crime, generally fit the description of the attacker, gave a false alibi, had a propensity for older women, and was violent. (Pet. App. at 20a-21a.)

(Cont'd)

Court put it, petitioners failed to present their federal claim with "fair precision and in due time." *Id.* at 88. That is simply not the case here.

[6] The Brief of *Amicus Curiae* Certain Professors of Evidence in support of the Petition canvasses the variety of approaches to the admissibility of third-party guilt evidence across the country. We simply illustrate the point below.

[7] *State v. Gibson*, 44 P.3d 1001, 1004 (Ariz. 2002) (en banc); *People v. Hall*, 718 P.2d 99 (Cal. 1986); *Rivera v. State*, 561 So. 2d 536, 539 (Fla. 1990); *Joyner v. State*, 678 N.E.2d 386, 389 (Ind. 1997); *People v. McCracken*, 431 N.W.2d 840, 842 (Mich. Ct. App. 1988); *State v. Holterman*, 687 P.2d 1097, 1101 (Or. Ct. App. 1984); *State v. Powers*, 101 S.W.3d 383, 395 (Tenn. 2003).

Second, many states apply a heightened standard for assessing the admissibility of third-party guilt evidence, but (unlike South Carolina) do so without comparing that evidence to the quality or quantity of the evidence against the defendant.[8] In fact, in these states, courts have ordered new trials for defendants convicted without the benefit of a proffered third-party guilt defense, even though significant direct and/or forensic evidence supported conviction.[9]

Finally, there are South Carolina and at least one other state that stand at the far end of the spectrum. These states exclude third-party guilt evidence where such evidence does not create a reasonable inference of innocence when compared to the state's evidence, including the forensic evidence. (Pet. at 22 & n.13.)[10] Simply put, under South Carolina's approach, Petitioner was barred from presenting evidence that he could have presented had he been tried in all but a few other states. Given that the Constitution guarantees "criminal defendants a meaningful opportunity to present a complete defense," *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (internal quotations omitted), the Court should grant the Petition and determine the permissible contours of state evidentiary rules that block the introduction of evidence that, in many cases, could be the lynchpin of a complete defense -- evidence that a third party is the real culprit.[11]

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[8] *See, e.g., State v. Marsh*, 102 P.3d 445, 454-57 (Kan. 2004); *State v. Israel*, 539 S.E.2d 633, 634 (N.C. 2000).

[9] *See, e.g., Johnson v. Singletary*, 647 So. 2d 106 (Fla. 1994); *Marsh*, 102 P.3d at 454-57; *State v. Barriner*, 111 S.W.3d 396 (Miss. 2003); *Israel*, 539 S.E.2d at 634-36.

[10] *State v. Williams*, 593 N.W.2d 227, 234 (Minn. 1999).

[11] The seven pages the State devotes to denigrating Petitioner's third-party guilt evidence (Opp. at 18-25) overlooks the trial court's finding on the strength of this evidence (Pet. App. at 20a-21a), which the state supreme court did not disturb (Pet. at 14). The State maintains that Petitioner's third-party guilt evidence would not have "confront[ed]" the evidence against him. (Opp. at 15.) That contention has no merit. Petitioner either committed the crime, or he did not and someone else did. Evidence that another person, and not Petitioner, was the culprit surely would have confronted the State's evidence that Petitioner was guilty. Furthermore, the evidence of third-

(Cont'd)

II. Review Of Petitioner's Constitutional Challenge To The Prosecutor's Reference In Closing Argument To The Lack Of Evidence Of Third-Party Guilt Is Warranted.

A. There Is No Procedural Barrier To This Court's Review Of Petitioner's Constitutional Challenge To The Prosecutor's Reference In Closing Argument To The Lack Of Evidence Of Third-Party Guilt.

The State asserts that Petitioner's failure to object immediately after the prosecutor's remarks in closing argument on the lack of evidence of third-party guilt amounts to a procedural default under South Carolina law barring this Court's review of Petitioner's claim that those remarks cannot be squared with *Simmons v. South Carolina*, 512 U.S. 154 (1994), and *Skipper v. South Carolina*, 476 U.S. 1 (1986). (Op. at 26-27.) The State ignores entirely, however, the venerable principle that unless a supposed state procedural rule "is strictly or regularly followed" by the courts of the state, failure to comply with that rule does not constitute a procedural default precluding review in this Court of federal constitutional questions. *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982). The cases on which the State relies do not show that South Carolina courts strictly or regularly require defense counsel in criminal cases to register an objection to a statement in the prosecutor's closing argument immediately after the statement is made by interrupting the prosecutor in the midstream, instead of waiting until the end of the closing argument.

(Cont'd)

party guilt would have confronted the State's evidence by bolstering critical elements of his defense theory – namely, that the forensic evidence was tainted; that the police investigation was not rigorous; and that the prosecution rushed to judgment in charging and trying him. (Pet. at 20.) The State's reliance on *United States v. Scheffer*, 523 U.S. 303 (1998) (Opp. at 12), is misplaced. In *Scheffer*, the Court upheld the exclusion of polygraph evidence petitioner sought to introduce. In addition to concerns about the scientific reliability of such evidence, the Court expressed concern that its admission could "diminish the jury's role in making credibility determinations." *Id.* at 313. By contrast here, that core jury function would have been served through the introduction of evidence of third-party guilt. Specifically, the jury would have been the "lie detector," *id.* at 313, and weighed the credibility of Petitioner's witnesses who spoke to third-party guilt, against the credibility of the State's witnesses.

The State's reliance on *State v. Williams*, 223 S.E.2d 38 (S.C. 1976), *State v. Franklin*, 456 S.E.2d 357 (S.C. 1995), and *State v. Wiggins*, 500 S.E.2d 489 (S.C. 1998), is puzzling. *Williams* did not even involve an objection to statements made by the prosecutor in closing argument. 223 S.E.2d at 44. Rather, the issue there was whether the defendant was deprived of effective assistance of counsel because of his attorney's failure to ensure that there was a record of what the prosecutor said in his closing argument. *Id. Franklin* and *Wiggins* are equally irrelevant. In both cases, the defendants made no objections whatsoever at any point at trial to the prosecutors' closing arguments. *Franklin*, 456 S.E.2d at 363; *Wiggins*, 500 S.E.2d at 496.

State v. Humphries, 479 S.E.2d 52 (S.C. 1996), is of no utility to the State either. In that case, the defendant failed to preserve his objection to the prosecutor's use of victim impact statements in closing because the defendant had objected to the statements "only on the basis that the defendant had not received prior notice that [this evidence] would be introduced," and had "made no contemporaneous objections relating to the amount of victim impact evidence or the way in which it was used." *Id.* at 56. *Humphries* says absolutely nothing, however, about any requirement in South Carolina law that a defendant must object to a statement in a prosecutor's closing argument as soon as the statement is made.[12]

State v. McIver, 120 S.E.2d 393 (S.C. 1961), actually undermines the State's position. In *McIver*, the South Carolina Supreme Court held that a defendant's objection to statements in a prosecutor's closing argument came too late because it was made in a motion for new trial after the trial was over. *Id.* at 397. The court did not mandate, however, that such objections be levied immediately after the statements are made. Indeed, as the Petitioner pointed out (Pet. at 28), *McIver* is one

[12] The same is true of *State v. Patterson*, 482 S.E.2d 760 (S.C. 1997). That decision notes that an objection to statements in the prosecutor's closing argument was made and holds that the statements were not prejudicial, but it does not say when the objection was made or when objections to statements in a prosecutor's closing argument must be made. *Id.* at 766.

of several cases in which the South Carolina Supreme Court has indicated that an objection to a prosecutor's closing argument need only be sufficiently contemporaneous so as to give the trial judge time to issue a curative instruction. 120 S.E.2d at 397 (objection to closing argument should have been made before the jury was charged so that the court have declared a mistrial or instructed the jury to disregard improper portions of the close).

The State cites only one case, *State v. Rabon*, 272 S.E.2d 634 (S.C. 1980), in which the South Carolina Supreme Court has suggested that criminal defendants must object to a statement in a prosecutor's closing argument immediately after the statement is made.[13] But a single case hardly reflects strict or regular adherence to the purported procedural rule that the State invokes. In any event, the Petition acknowledged *Rabon* (Pet. at 28), and observed that even in that case, as in *McIver*, the South Carolina Supreme Court said that the purpose of the contemporaneous objection requirement is to ensure that an improper statement in a prosecutor's closing argument is promptly called to the trial judge's attention "such that a corrective instruction, if needed, may be given." (Pet. at 28 [quoting *Rabon*, 272 S.E.2d at 636].) That purpose was met here. As the Petitioner showed (Pet. at 29), in objecting to the prosecutor's closing argument as soon as it was completed, Petitioner's counsel afforded the trial judge the opportunity to issue a curative instruction before the jury was charged.[14]

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[13] The State cites *Varnadore v. Nationwide Mutual Ins. Co.*, 345 S.E.2d 711 (1986), but it is a civil case and does not speak to any requirement imposed on criminal defendants by South Carolina law to interpose objections to statements in a prosecutor's closing argument right after the statements are uttered.

[14] The State also suggests that Petitioner failed to preserve his constitutional objection to the prosecutor's closing argument because the objection below was premised on *Doyle v. Ohio*, 426 U.S. 610 (1976), and *Griffin v. California*, 380 U.S. 609 (1965), rather than on *Simmons* and *Skipper*. (Opp. at 29.) The State is again mistaken. In determining whether a federal claim was preserved, this Court looks to the constitutional right invoked, not the precise argument in support of the claim of a violation of that right. *See Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899) ("Parties are not confined here to the same arguments which were advanced in the courts

(Cont'd)

B. The Prosecutor's Remarks In Closing Argument On Petitioner's Failure To Present Evidence Of Third-Party Guilt Cannot Be Reconciled With *Simmons* and *Skipper*.

The State contends that *Simmons* and *Skipper* are inapposite. (Opp. at 28). While it is difficult to discern the distinction that it is trying to draw, the State apparently is saying that the third-party guilt evidence that Petitioner was barred from introducing was not "competent and relevant," unlike the evidence that the defendants in *Simmons* and *Skipper* sought to introduce. (Opp. at 28.) This distinction is chimerical.

The trial court determined that the third-party guilt evidence Petitioner sought to introduce was sufficiently credible such that the jury could conclude that somebody else, Jimmy White, committed the crime. (Pet. App. at 20a-21a.) At the State's urging, however, the trial court concluded that this evidence was inadmissible under South Carolina's rule on third-party guilt evidence. (Pet. App. at 24a.) The South Carolina Supreme Court did not disturb the trial court's determination that the third-party guilt evidence was credible. (Pet. at 14.) If, as Petitioner maintains, the South Carolina rule on third-party guilt evidence cannot be reconciled with this Court's precedents, then Petitioner was unconstitutionally precluded, at the State's urging, from presenting credible evidence in his defense. In sum, there is no constitutionally meaningful distinction between the competence of the evidence excluded in this case and the competence of the evidence excluded in *Simmons* and *Skipper*.

(Cont'd)
below upon a federal question there discussed."); *see also* Stern & Gressman, *et al.*, *Supreme Court Practice* 191 (8th ed. 2002). Like *Simmons* and *Skipper*, *Doyle* involved a due process challenge to remarks in a prosecutor's closing argument on the absence of evidence (in that case, the absence of evidence from defendant himself following his invocation of his *Miranda* rights). 426 U.S. at 610. In the South Carolina Supreme Court, Petitioner cited *Doyle* and argued that the prosecutor's remarks in closing argument on the absence of third-party guilt evidence violated his due process right. (Pet. Supp. App. 15a-17a.) Petitioner's reliance on the Due Process Clause in challenging the prosecutor's remarks preserved the due process challenge that Petitioner is making here under *Simmons* and *Skipper*.

In his closing argument, the prosecutor compounded the constitutional violation when he exploited the wrongful exclusion of the third-party guilt evidence by trumpeting its absence.[15] In that regard, South Carolina's conduct here mirrors its conduct that the Court condemned in *Simmons* and *Skipper*. In those two cases, the State successfully argued for the exclusion of what this Court said was competent evidence on a critical issue (the defendants' future dangerousness), and then, in closing argument, the State seized on its victory by highlighting the defendants' failure to introduce that very evidence. In both cases, this Court held that the prosecutors' references in their closing arguments to the missing evidence violated the defendants' due process right of fair rebuttal to evidence presented against them. *Simmons*, 512 U .S. at 166 n.5; *id.* at 177 (O'Connor, J., concurring in the judgment); *Skipper*, 476 U.S. at 4-5 & n.1; *id.* at 10 (Powell, J., concurring in the judgment). Similarly, here, the prosecutor's remarks on the missing evidence of third-party guilt violated Petitioner's due process right to rebut evidence presented against him.

Respectfully submitted,

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[15] The State's extended recitation of South Carolina law governing the scope of closing arguments and the extent to which prosecutors may comment on the defendant's evidence (Opp. at 28-29) is wholly irrelevant to the federal constitutional question posed here: whether the prosecutor's reference to the lack of evidence of third-party guilt is inconsistent with *Simmons* and *Skipper*.

APPENDIX

APPENDIX A

STATE v. HOLMES

PRETRIAL BRIEFING URGING THE ADMISSION OF DEFENDANT'S THIRD-PARTY GUILT EVIDENCE

STATE OF SOUTH CAROLINA
IN THE COURT OF GENERAL SESSIONS
FOR THE SIXTEENTH CIRCUIT

90-GS-46-1196, 1197, 1198, 1200

THE STATE OF SOUTH CAROLINA,
COUNTY OF YORK

v.

BOBBY LEE HOLMES,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO ADMIT EVIDENCE OF THIRD-PARTY GUILT AND OF WILLFULLY INADEQUATE INVESTIGATION BY THE YORK POLICE DEPARTMENT

* * *

Second, to prevent a jury from considering this reliable and compelling evidence of Mr. White's guilt would certainly "defeat the ends of justice." *Id.* Mr. White has confessed on

at least five separate occasions to committing the attack at issue. As noted above, each confession of Mr. White serves to corroborate the others. *See id.* at 300. In addition to Mr. White's numerous confessions, the defense also has substantial corroborating evidence demonstrating that Mr. White had the opportunity to commit the crime at issue, had motive to commit the crime, fit the description of the attacker better than Mr. Holmes did, and lied about his whereabouts on the morning of the attack. Furthermore, Mr. Holmes seeks to introduce evidence that the York Police Department's failure to adequately investigate Mr. White can be explained by the fact that Mr. White was serving as a confidential informant for Officer Smith. To permit a jury to determine Mr. Holmes's fate without weighing such evidence would most definitely "defeat the ends of justice."[17]

* * * *

17. Obviously, a defendant's right to present relevant testimony is not without limitation and must be balanced against "other legitimate interests in the criminal trial process." *Chambers*, 410 U.S. at 295. However, the restriction of a criminal defendant's constitutional rights "calls into question the 'integrity of the fact-finding process.'" *id.*, and "may not be arbitrary or disproportionate to the purposes [such rights] are designed to serve." *Rock v. Arkansas*, 483 U.S. 44, 56 (1987). The United States Supreme Court has recognized that the denial or significant diminution of the right to confront and cross-examine witnesses "requires that the competing interest be closely examined." *Chambers*, 410 U.S. at 295.

* * * *

APPENDIX B

STATE v. HOLMES TRIAL TRANSCRIPT MARCH 19, 2001

PRESERVATION OF CONSTITUTIONAL OBJECTIONS TO THE THE EXCLUSION OF THIRD-PARTY GUILT EVIDENCE FOR PURPOSES OF IMPEACHMENT DURING THE GUILT PHASE OF TRIAL

[Commencing at page 2713]

* * *

MR. NETTLES: Okay, that's fine. That's just what I need to know. The court has ruled that I can't discuss in any way, shape or form the investigation of anyone else in relation to the commission of this crime?

THE COURT: That's the ruling.

MR. NETTLES: Okay.

THE COURT: And for your benefit, and I don't think that this would be considered a motion in limine, because we are in the middle of a trial --

MR. NETTLES: Right.

[2714] THE COURT: -- and been proffered.

MR. NETTLES: Right.

THE COURT: I feel this is the time to make it and the time --

MR. NETTLES: Yes, sir.

Appendix B

THE COURT: -- to rule, and I don't feel like you need to -- I think you are protected. I don't think that you need to keep turning to me every time and say, Your Honor --

MR. NETTLES: It is.

THE COURT: -- here is where I would ask one of those questions.

MR. NETTLES: Thank you.

THE COURT: Because I just think that's not what the courts require, but I don't want you to be in a situation where you go up and the court says, well, the judge just made a preliminary ruling. This isn't a preliminary ruling. This one is long, long and hard thought out to the degree I'm capable of it, well thought out, and that is the ruling.

MR. NETTLES: Okay. Your Honor, I would like, for the record, that by not allowing this, it violates Mr. Holmes right to a fair trial secured by -- to my client by the Due Process Clause of the United States, secured by the state and federal [2715] constitutional right to present a complete and adequate defense, as contained in Washington v. Texas, and the right to effective cross-examination under the right to confront them with the state and with the federal constitution. Thank you.

* * *

Appendix B

STATE v. HOLMES TRIAL TRANSCRIPT

MARCH 21, 2001

TRIAL COURT'S RECONSIDERATION OF ITS EXCLUSION OF THIRD-PARTY GUILT EVIDENCE DURING THE GUILT PHASE OF TRIAL

[Commencing at page 3638]

* * *

(Proceedings reconvened)

THE COURT: All right. On the issue of the [3639] third-party guilt matter, does defense have anything further to add to it?

MR. KRELL: Yes, Your Honor.

* * *

[3646] MR. KRELL: Well, Your Honor, under Chambers v. Mississippi, the United States Supreme Court held that "a rule of evidence" -- and here we're talking about the Gregory standard -- "may not be applied mechanistically to defeat the ends of justice," Your Honor.

* * *

[3648] That is not our situation, Your Honor. You are at the threshold of deciding the Gregory issue. And [3649] we have, as you well know, because I know that you have reviewed this recently, not only four confessions, which tend to corroborate each other, as the United States Supreme Court

said in Chambers v. Mississippi. The court said "the sheer number of independent confessions provided additional corroboration for each." In Chambers there were four confessions, coincidentally.

Not only do we have those four confessions that are corroborating each other, Your Honor, but as you noted in your order, we have at least three witnesses who put Jimmy White in the proximity of Mary Stewart's apartment near the time of the attack.

In addition, we have James White's statement to the police that he got a ride home with Junior Lytle that night. And we have Junior Lytle saying I did not do that. And the court said that Jimmy White -- if you put -- if he is put up for relevant testimony would be subject to impeachment on that issue, based on Josh Lytle's testimony.

In addition, we have the fact that Jimmy White arguably fits the description of the attacker better than Bobby Lee Holmes. We have a photograph of Bobby Lee Holmes and this is not longish hair, Your [3650] Honor. Jimmy White had a shag cut, or what some people call the box cut at that time. He didn't have hair that looks like this, which is very similar to the hair that Bobby Lee Holmes has today.

Your Honor, with all due respect, the evidence that we have presented to you pointing to Jimmy White is not what you called at the beginning of the -- what you were worried about at the beginning of this trial of a potential wild goose chase. I understand the court's reservations about allowing a defendant to go on a wild goose chase. Your Honor, this is

not a wild goose chase. And consistent with the Sixth, Fourteenth, Fifth Amendment Rights to the United States Constitution and the corresponding Articles of the South Carolina Constitution, Article 1, Section 3, consistent with the Fourteenth Amendment, Bobby Lee Holmes' due process rights to a fair trial and the offer that you just gave him, Your Honor. In South Carolina Constitution Article 1, Section 14, it would be a violation of Bobby Lee Holmes' rights to not let a jury hear that evidence before deciding whether he is guilty of capital murder and potentially sentencing him to death, Your Honor. That would be -- that would be a miscarriage of justice, Your Honor.

* * *

[3655] THE COURT: As I said, this is a very difficult decision. I'm going to disallow the testimony. I do not believe under Rule 804(b)(3) or 801(d)(1)(a) that it can come in under either of those rules. And like in Cooper and the other cases, in Gregory, we sort of dance around these Gregory standard and other things, but in Cooper, which was a 1999 case, there is a statement dealing with the individual who wanted to testify about overhearing the statement, and I know it was only one, "but aside from Nelson's assertion there was no credible evidence linking Gilmore to the victim's murder." So I know when we [3656] talk about the trustworthiness of the statements, that's one issue, but here there is no evidence that tends to clearly point out that Mr. White was guilty of the crime. And that under the two rules that it can't come in evidentiary-wise, but also substantive-wise as to third-party guilt.

MR. KRELL: Your Honor, I just want to make sure that the record is straight. Your holding is that Rule 804 and 801 are essentially trumping the Constitutional Rights of Bobby Lee Holmes, is that right, under Chambers v. Mississippi?

THE COURT: Well, I'm just saying those are the rules and our court has interpreted them, and particularly that they are the Rules of Evidence. I'm not going to say they are trumping anything. I'm just making a ruling.

MR. KRELL: Thank you Your Honor.

* * *

[3709] THE COURT: All right.

And just for the record, this third-party guilt issue, I promise we are going to continue to look at it, but I have gone back and read Chambers [3710] v. Mississippi, because I certainly didn't want to be in the position to having to trump the United States Supreme Court. Obviously they hold the trump card, but in that I find the case, that case, factually dramatically different from the case that we have here. And that case ends by stating and reaching this judgment, that is, allowing the third-party guilt in that particular case, "we establish no new principles of Constitutional law, nor do our holdings signal any diminution in respect traditionally accorded to the state in establishment and implementation of their own criminal trial rulings and procedures. Rather we hold quite simply that under the facts and circumstances of this case, the ruling of the trial court strives so he can get a fair trial."

Appendix B

In that case there was an eyewitness. There was a repudiated confession. Proof of ownership of a well lot. So I just -- my comfort level is a little better, Mr. Krell.

* * * *

APPENDIX C

PETITIONER'S FINAL BRIEF TO THE SOUTH CAROLINA SUPREME COURT

CONSTITUTIONAL ARGUMENTS REGARDING THE EXCLUSION OF THIRD-PARTY GUILT EVIDENCE DURING THE GUILT PHASE OF TRIAL

* * *

QUESTION II

The lower court erred in denying appellant the right to present evidence of third party guilt in the case.

* * *

Appendix C

* * * [8]

The lower court erred in ruling that appellant's third party guilt evidence was inadmissible at trial in violation of the due process clause of the fifth amendment and in violation of the sixth, eighth and fourteenth amendments to the United States Constitution and article 1, § 3, § 14 and § 15 of the South Carolina State Constitution.

---

8. In suppressing the Jimmy White evidence, the court partially relied upon *State v. Gay*, 541 S.E.2d 541 (S.C. 2001), in which the defendant failed to satisfy the *Gregory* standard for the introduction of evidence of the guilt of a third party. However, *Gay* is distinguishable from the present case in three important ways. *See* 2001 ROA pp. 3640-42. First, the third party in *Gay never confessed to the crime charged.* The third party in that case admitted that he argued with, hit, and had sex with the victim on the day she was found. That statement was not a confession to the crime charged (murder) and was therefore not inconsistent with the guilt of the defendant. In contrast, the defense in the present case has proffered credible testimony that Jimmy White has confessed to the crime charged to multiple witnesses, along with other corroborating evidence linking Mr. White to the crime. Second, *Gay* is distinguishable from the present case because, as described below, the state in the present case failed to conduct an adequate investigation into Jimmy White: for instance, the state failed to test Jimmy White's clothes for the victim's blood, and failed to compare Jimmy White's shoes with an unknown footprint at the scene of the crime. Third, *Gay* is distinguishable from the present case because the evidence pointing to the defendant in *Gay* was far more reliable than that pointing to appellant in this case.

Appendix C

QUESTION III

The lower court erred in denying appellant the right to call Jimmy White as a witness in order to present impeachment evidence in support of his third party guilt defense.

* * *

The lower court erred in failing to allow the defense to present impeachment evidence on the issue of third party guilt in violation of the due process clause of the fifth amendment to the United States Constitution, and in violation of the sixth, eighth and fourteenth amendments to the United States Constitution and article 1, § 3, § 14 and § 15 of the South Carolina State Constitution.

QUESTION IV

The lower court erred in denying appellant the opportunity to impeach state police at trial.

* * *

Even though the court (erroneously) excluded third party guilty evidence as substantive evidence, the court has made clear that such evidence can be admissible for the purpose of impeaching of state witnesses, including the police. *See, e.g., State v. Fossick*, 508 S.E.2d 32, 33 n.1 (S.C. 1998) ("Even if this evidence is inadmissible as substantive evidence, however, it may still be admissible for

impeachment purposes."). Furthermore, the United States Supreme Court has held that a defendant may use evidence pointing to the guilt of another person to conduct cross-examination of the police regarding their failure to direct investigation against the other person and to attack "the thoroughness and even the good faith of the investigation . . ." *Kyles v. Whitley*, 514 U.S. 419, 442 n.13, 445 (1995); Def.'s July 30, 2000 Brief at 17; 2001 ROA p. 2052, l. 14 – p. 2055, l. 15.

In light of the precedent discussed above, the defense in the case at bar clearly had the right to cross-examine the York Police investigators regarding their credibility and the "thoroughness" and "good faith" of their investigation into Jimmy White, which were not only relevant but central to the issues in appellant's defense. . . .

Furthermore, appellant sought to question the York Police witnesses regarding the how and when they learned that Jimmy White had confessed to several people that he had committed the crimes charged against appellant, or that Jimmy White had been seen in the proximity of Ms. Stewart's apartment near the time the attack allegedly occurred. Appellant also sought to ask the York Police why, despite this evidence pointing to Jimmy White, the police failed to test Jimmy White's shoes against an unidentified foot print at the scene of the crime, and why they failed to test any of Jimmy White's clothes for the victim's blood. Through such questioning, the York Police witnesses should have been required to explain to the jury why they believe now

and believed during their investigation that no further investigation of Jimmy White was necessary.[13]

Through the use of extrinsic evidence, the defense should have been permitted to challenge the credibility of the York Police witnesses and their investigation. Instead, the jury was allowed to assume erroneously that the investigation into the Stewart attack was complete. The error violated appellant's right to due process under the fifth amendment and his rights under the sixth, eighth, and fourteenth amendments to the United States Constitution and article 1, § 3, § 14 and § 15 of the South Carolina State Constitution.

---

13. The Jimmy White evidence is even more compelling than the third party guilt evidence that lead to the reversal of the conviction in *Kyles*. In that case, the state possessed evidence suggesting that a third party, nicknamed "Beanie," could have committed the murder for which the defendant was convicted. First, Beanie arguably fit a description of the perpetrator better than the defendant did. *See Kyles*, 514 U.S. at 442. Second, Beanie had made several inconsistent and suspicious statements to the police that "would have allowed the jury to infer that Beanie was anxious to see Kyles arrested for [the] murder." *Id.* at 445. Third, one of Beanie's statements to the police suggested that Beanie could have planted evidence against the defendant. See *id.* at 447-48. As noted above, the *Kyles* court concluded that the evidence of third party guilt regarding Beanie would have raised opportunities for the defense to conduct cross-examination of the police on their "failure to direct any investigation against Beanie," *id.* at 442 n.13, and to attack "the throughness and even the good faith of the investigation. . . ." *Id.* at 445. Furthermore, the court ruled that it is "reasonably probable" that the introduction of such evidence would have led to a result other than the defendant's conviction for capital murder. *Id.* at 441.

Appendix C

QUESTION V

The lower court erred in excluding third party guilt evidence under Rule 804(b)(3), SCRE when the evidence was admissible under Rule 801(d)(1)(A), SCRE.

* * *

The lower court erred in excluding evidence of third party guilt under Rule 804(b)(3), SCRE when said evidence was admissible under Rule 801(d)(1)(A), SCRE in violation of the due process clause of the fifth amendment and in violation of the sixth, eighth, and fourteenth amendments to the United States Constitution and article 1, § 3, § 14 and § 15 of the South Carolina State Constitution.

QUESTION VI

The lower court erred in denying appellant's motion for a mistrial when the solicitor commented on the absence of third party guilt evidence (therein negating the very third party guilt evidence ruled inadmissible at trial) via remarks at closing regarding appellant's failure to call witnesses to prove that he was framed.

* * *

Due process guarantees a defendant's protection from closing arguments (by the prosecution) that shift the burden of proof from the state to the defense via impermissible comments on a defendant's failure to present evidence in his defense at trial as it is the prosecution's burden to establish

proof of guilt beyond a reasonable doubt. *Doyle v. Ohio*, 426 U.S. 610 (1976). One cannot comment on a defendant's exercise of a constitutional right, i.e., to put the state to the test of proving its case beyond a reasonable doubt. *Doyle v. Ohio*, *supra*; *Griffen v. California*, 380 U.S. 609 (1965). If a defendant presents no evidence, it is improper for the solicitor to comment on the defendant's failure to call a particular witness, but if the accused presents evidence the prohibition does not apply. *Douglas v. State*, 332 S.C. 67, 504 S.E.2d 307 (1998); *State v. Primus*, 341 S.C. 592, 535 S.E.2d 152 (2000); *State v. Pickens*, 320 S.C. 528, 466 S.E.2d 364 (1996).

Here, however, even though appellant presented evidence at trial, appellant was precluded from presenting third party guilt evidence. Therefore, the solicitor's argument to the effect that it was ludicrous to think appellant was framed because who else but appellant could be guilty violated *Doyle* because on the question of third party guilt, appellant was not allowed to present evidence (albeit an involuntary failure to present such evidence) on that topic. The proposition is that where a party lacks control over a potential witness the drawing of an adverse inference for failure to call such witness is improper. *Duckworth v. First Nat'l Bank*, 176 S.E.2d 297, 304 S.C. 563 (1970), interpreting *Davis v. Sparks*, 111 S.E.2d 545 (1959). When the state suggested that the defendant did not adequately justify the guilt of another individual, especially when the state knew the defendant could not call that individual as a witness, it had impermissibly shifted the burden of proof. Thus, the comments regarding the same were burden shifting, unconstitutional, and fundamentally unfair as appellant had numerous witnesses available to testify regarding third party guilt.

* * *

Appendix C

The lower court erred in denying appellant's motion for a mistrial when the solicitor shifted the burden of proof in denying guilt of others therein negating the very third party guilt evidence ruled upon as inadmissible evidence at trial in violation of the due process clause of the fifth amendment and in violation of the sixth, eighth and fourteenth amendments to the United States Constitution and article § 3, § 14, and § 15 of the State Constitution.

* * *

QUESTION VIII

The court committed reversible error by excluding third party guilt evidence from the penalty phase.

The court also committed reversible error by excluding third party guilt evidence from the penalty phase of the trial. ROA p. 4404, 11. 20-21. Pursuant to the sixth, eighth, and fourteenth amendments to the United States Constitution, article 1, § 3 and § 14 of the South Carolina Constitution, the South Carolina Code, and other applicable state and federal law, appellant was entitled to present this evidence during the penalty phase, regardless of whether such evidence was admitted during the guilt-or-innocence phase.

Evidence introduced during the penalty phase of a criminal case is not held to the same evidentiary standards utilized at the guilt-or-innocence phase.[23] For instance, in

23. *See, e.g., Green v. Georgia*, 442 U.S. at 96-97 (holding that exclusion of third party confession from punishment phase on hearsay (Cont'd)

Green v. Georgia, 442 U.S. 95 (1979), the Supreme Court found that the exclusion during the sentencing phase of evidence of third party guilt would constitute a due process violation, "[r]egardless of whether the proffered testimony comes within [the] Hearsay rule." *Green*, 442 U.S. at 97. Relying on *Lockett*, the *Green* Court reasoned that evidence that tended to show the guilt of another could not be kept from the sentencer. As in this case, the defendant in *Green* offered the testimony of a witness who had heard a person other than the defendant confess to the crime. The *Green* court determined that suppressing the testimony of a single witness to a third party confession constituted a denial of a

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(Cont'd)

grounds "constituted a violation of the due process clause of the fourteenth amendment," even though the evidence may have been properly excluded during the trial phase); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (In a capital case, "the eighth and fourteenth amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor* . . . any of the circumstances of the offence that the defendant proffers as a basis for a sentence less than death.") (finding capital punishment statute unconstitutional where it did not permit individual consideration of mitigating factors) (emphasis in original); *State v. Kornahrens*, 350 S.E.2d 180, 185 (S.C. 1986) ("The purpose of the bifurcated proceeding in a capital case is to permit the introduction of evidence in the sentencing proceeding which ordinarily would be inadmissible in the guilt phase.") (citation omitted); *see also Hitchcock v. Dugger*, 481 U.S. 393 (1987) (exclusion of mitigating evidence not enumerated in the statute was prejudicial error); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (finding error where trial court excluded evidence of defendant's ability to adapt to prison environment); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (finding reversible error where sentencing judge refused to consider evidence of defendant's violent upbringing).

fair trial to the defendant. *Green*, 442 U.S. at 97 (vacating sentence because of exclusion of single witness). In the present case, the court suppressed the testimony of multiple witnesses to Jimmy White's confessions, in addition to testimony that placed Jimmy White in close proximity to the scene of the crime near the time it took place and that tends to show that Jimmy White lied to the police about his alibi, in addition to other evidence pointing to Jimmy White.

The United States Supreme Court has held that, with regard to constitutional rights that directly affect the ascertainment of guilt, a rule of evidence "may not be applied mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302 (holding that defendant's constitutional rights were violated by the exclusion of hearsay evidence tending to show that a third party fired the shot that killed the victim) (emphasis added).[24] Through its arbitrary misapplication of the hearsay rule to exclude all third party guilt evidence from this case, the court clearly violated the United States Supreme Court's holding in Chambers.[25]

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24. See also *Crane*, 476 U.S. at 690 (A criminal defendant's opportunity to be heard "would be an empty one if the State were permitted to exclude competent, reliable evidence . . . when such evidence is central to the defendant's claim of innocence.").

25. Even if the Jimmy White confessions were inadmissible hearsay (which they are not), the court's "mechanistic" application of the hearsay rule to exclude all Jimmy White evidence from consideration by the jury in this case would have still resulted in a violation of appellant's constitutional rights under *Chambers*. For a discussion of the constitutional arguments discussed below, ROA pp. 2034-35, 3656.

Appendix C

Chambers is strikingly similar to the present case. In *Chambers*, the defendant (who was convicted of murder), was not permitted by the trial court to call three witnesses, each of whom would have testified that a third party admitted on separate occasions that he actually committed the murder. The trial court excluded the statements as hearsay and the Mississippi Supreme Court affirmed. However, the U.S. Supreme Court reversed, holding that the exclusion of these statements contributed to a denial of the defendant's right to a "trial in accord with traditional and fundamental standards of due process." *Chambers*, 410 U.S. at 302.

It is well-settled that criminal defendants have a constitutional right under the sixth amendment to have "compulsory process for obtaining witnesses in his favor," which is guaranteed in the criminal courts of the states by the fourteenth amendment.[26] This constitutional right has been described by the United States Supreme Court as follows:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide

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26. See *Washington v. Texas*, 388 U.S. 14, 17-19 (1967) (holding that a defendant's constitutional right of compulsory process was violated by the application of a Texas law rendering an accomplice incompetent to testify for criminal defendants); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (concluding that the constitution guarantees criminal defendants a "meaningful opportunity to present a complete defense") (citations omitted).

> where the truth lies. *Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.*

Washington, 388 U.S. at 19 (emphasis added); *see also Chambers*, 410 U.S. at 302 ("*Few rights are more fundamental than that of an accused to present witnesses in his own defense.*") (emphasis added).

The sixth amendment also guarantees the right of a criminal defendant "to be confronted with the witnesses against him." Indeed, a primary interest secured by the confrontation clause is the right of cross-examination. *See Davis v. Alaska*, 415 U.S. 308, 315 (1974). This right to cross-examine the state's witnesses "helps assure the accuracy of the truth-determining process." *Chambers*, 410 U.S. at 295. The right to cross-examination is "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Id.* Furthermore, a criminal defendant's due process rights, which are guaranteed by the fourteenth amendment to the United States Constitution, include "the right to a fair opportunity to defend against the state's accusations."[27] *Chambers*, 410 U.S. at 294.[28]

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27. This Court has also recognized the significance of a defendant's right of confrontation. *See, e.g., State v. Sparkman*, 339 S.E.2d 865, 867 (S.C. 1986) (citing *Davis v. Alaska*, 415 U.S. 308 (1974)) (reversing conviction in which defendant was precluded from cross-examining state witness on the witness's juvenile record). Furthermore, the constitutional rights discussed above are also

(Cont'd)

Appendix C

In light of the constitutional standards set forth above, the court clearly violated appellant's constitutional rights by preventing him from calling witnesses regarding third party guilty evidence and cross-examining the state's witnesses on this issue.

First, the court's "mechanistic" reliance on the hearsay rule to prevent a jury from considering this reliable and

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(Cont'd)
guaranteed by the constitution of the State of South Carolina. *See* e.g., S.C. Const. art 1, § 3 (No person shall be "deprived of life, liberty, or property without due process of law . . ."); S.C. Const. art 1, § 14 ("The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to be fully heard in his defense by himself or by his counsel or by both.").

28. Moreover, the jury's paramount role in capital cases was recently reemphasized by the Supreme Court in *Ring v. Arizona*, 122 S.Ct. 2428 (2002). Holding that aggravating facts must be found by a jury and not a judge, the court made clear in *Ring* that, when analyzing the sixth amendment right to a jury trial, a practical, common-sense approach must prevail over a formal, technical application of the law. Clearly the trial judge in appellant's case failed to take such an approach, by excluding from the jury all evidence related to Jimmy White's guilt. That decision had the obvious effect of denying appellant the right to have a jury determine all relevant and material evidence before convicting him of murder. This unconstitutional deprivation cannot be tolerated, especially in a capital case. As Justice Scalia observed in *Ring*, "We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it." 122 S.Ct. at 2445 (Scalia, J., concurring).

compelling evidence of third party guilt evidence certainly violated appellant's sixth amendment right to a jury trial and "defeat[ed] the ends of justice." *Chambers*, 410 U.S. at 302.[29] Simply put, it defeats the ends of justice to allow a jury to convict a man of murder and sentence him to death without hearing evidence that another specified man has confessed to the crime on multiple occasions, was observed near the scene of the crime, apparently lied to police about his alibi, and arguably better fit the description of the attacker than the defendant did.

Second, in light of the quality and quantity of the third party guilt evidence, the court's application of the *Gregory* standard in this case amounts to a per se rule against the introduction of third party guilt evidence, which is clearly unconstitutional.[30]

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29. Nor surprisingly, the court denied the fact that its ruling meant that the South Carolina Rules of Evidence trumpted appellant's constitutional rights. See ROA p. 3656, ll. 7-16 ("THE COURT: Well, I'm just saying those are the rules and our court has interpreted them, and particularly that they are the Rules of Evidence. *I'm not going to say they are trumping anything. I'm just making a ruling.*") (emphasis added).

30. *See Rock v. Arkansas*, 483 U.S. 44, 61 (1987) ("A state's legitimate interest in barring unreliable evidence does not extend to per se exclusions that may be reliable in an individual case."); *see also Washington*, 388 U.S. at 22 ("It is difficult to see how the constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of a prior categories that presume them unworthy of belief.").

Third, the *Gregory* standard, as applied by the court, prevented the jury from considering relevant and material evidence that could create reasonable doubt of the defendant's guilt. This court has held that such a result is unconstitutional.[31] ROA p. 2021, ll. 11-17.

Fourth, the court violated appellant's constitutional right to present a complete defense because of the court's express bias against defendants who present evidence pointing to another person as the perpetrator. Indeed, in a moment of candor, the court revealed its prejudicial skepticism concerning third party guilt evidence:

> THE COURT: . . . And another thing that's overlaid with this, and I know I tell the jury they can't go outside the record, and I know the court can't go outside the record either, but — and this is this thing of a *somewhat pervasive occurrence now of individuals confessing to those events to which others have been found guilty.*

ROA p. 2021, ll. 11-17 (emphasis added).[32]

31. *See, e.g., State v. Osborne,* 345 S.E.2d 256, 258 (S.C. Ct. App. 1986) ("The proper standard of materiality [of evidence that was not disclosed by the State after *Brady* motions] must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. *It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.*") (emphasis added) (quotation omitted).

32. See also *Id.* at 2026, ll. 19-23 ("Well, but here you have that, the *nagging testimony* by individuals who, if testifying for the

(Cont'd)

Appendix C

The exclusion of third party guilt evidence violated appellant's rights under the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution and article 1, § 3, § 14, and § 15 of the South Carolina Constitution.

(Cont'd)
state, would be called snitches; *if they are testifying for the defense, they would be called saints*, who say that they heard these statements [confessions by the third party, Jimmy White].") (emphasis added). The *Gregory* test specifically calls for an "unbiased judicial inquiry." *Gregory*, 16 S.E.2d at 535.

APPENDIX D

PETITIONER'S FINAL REPLY BRIEF TO THE SOUTH CAROLINA SUPREME COURT

ARGUMENTS RELATED TO THE EXCLUSION OF THIRD-PARTY GUILT EVIDENCE DURING THE GUILT PHASE OF TRIAL

* * *

II. The State has failed to rebut the Appellant's argument that the lower court erred in excluding all evidence of third party guilt.

In an effort to support the trial judge's decision to exclude all evidence of third party guilt from this trial, the State makes several misleading arguments that are flatly contradicted by the proffered evidence pointing directly to a specific person, James McCaw White, as the perpetrator of the specific crime charged.[2] As explained below, the State simply fails to address the trial judge's significant legal errors that led to the exclusion of third party guilt evidence, which resulted in a violation of the South Carolina Rules of Evidence, South Carolina Supreme Court precedent, United States Supreme Court precedent, and the Constitutions of South Carolina and the United States.[3]

* * * *

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2. As demonstrated in the Appellant's Initial Brief and below, the trial judge erroneously excluded this evidence despite his earlier findings that the proffered evidence was credible.

3. *See* constitutional arguments made in Appellant's Initial Br. at 38-43, which are incorporated by reference herein.

(3)

No. 04-1327

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In The
Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF *AMICUS CURIAE* OF CERTAIN PROFESSORS OF EVIDENCE LAW IN SUPPORT OF PETITIONER

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BRIEF OF PROFESSORS OF EVIDENCE LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted on behalf of Professors of Evidence Law at various United States Law Schools. Petitioner Bobby Lee Holmes and Respondent the State of South Carolina have consented to the filing of this brief.

I. INTEREST OF *AMICUS CURIAE*[1]

Amici are professors of law with a particular interest in the application of state and federal rules of evidence. Their qualifications are set forth in the Appendix.

II. SUMMARY OF ARGUMENT

Petitioner was convicted of murder and sentenced to death. He proffered an abundance of evidence pointing to the guilt of another man, nearly all of which the trial court excluded. The South Carolina Supreme Court upheld the trial court's decision based on the state's applicable third-party evidence rule. The decision of the South Carolina Supreme Court cannot be squared with this Court's decision in *Chambers v. Mississippi*, 410 U.S. 284 (1973), which the South Carolina Supreme Court simply ignored. The Court should grant certiorari not only to correct the decision below, but more importantly, in order to clarify the status and scope of *Chambers*. Subsequent decisions of the Court have treated *Chambers* as establishing a generally applicable rule of law *and* as a *sui generis* exercise in error

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not authored in any part by counsel for any party, and that no person or entity made any monetary contributions to its preparation or submission.

correction. Such mixed signals have left the lower courts without the guidance they need in order to evaluate the constitutionality of state evidentiary rules governing the admissibility of evidence of third-party guilt and to apply those rules in a manner consistent with the Constitution.[2]

III. ARGUMENT

A. The Court Should Grant Certiorari Because The South Carolina Supreme Court, Confronted With Facts Materially Indistinguishable From Those Of *Chambers v. Mississippi*, Willfully Ignored This Court's Holding In That Case.

Petitioner Bobby Lee Holmes was arrested in December 1989 in York, South Carolina for the rape and assault of an eighty-six-year-old female victim. *State v. Holmes*, 605 S.E.2d 19, 21 (2004). The crime occurred early that morning after the perpetrator knocked on the victim's door and forced his way in. *Id.* at 20. The victim later died as a

[2] Holmes' petition for a writ of certiorari also argues that the writ should be granted because the exclusion of evidence of third-party guilt at the penalty phase violated the Eighth Amendment. Such exclusion denies a capital defendant the opportunity to present relevant mitigating evidence, thereby breaching the longstanding principle, articulated in *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), and its progeny, that a capital sentencer cannot "be precluded from considering, as a mitigating factor, . . . any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604. *Amici* would only emphasize that excluding relevant and probative evidence of innocence, such as the evidence excluded here, unnecessarily enhances the risk of an erroneous conviction. Recent studies of exonerations in the United States have underscored the fact that the falsely convicted defendant is a "disturbingly commonplace" event. *See, e.g.*, Samuel R. Gross et al., *Exonerations in the United States* (Apr. 19, 2004) (unpublished manuscript), *available at* http://www.law.umich.edu/newsandinfo/exonerations-in-us.pdf. Due process protections should therefore be at their apex when a state evidentiary rule operates to exclude such evidence.

result of the injuries sustained during the attack. *Id.* at 21. Petitioner protested his innocence from the start, insisting that he had never been inside the victim's home. *Id.* Someone else must have committed the crime. The state's case against him was circumstantial, consisting primarily of various pieces of forensic evidence linking petitioner to the crime. *Id.* at 21-22.

Petitioner's defense against the state's charges began with an effort to plant reasonable doubt concerning the state's forensic evidence of guilt. *Id.* at 22. *Every article* of physical evidence offered against petitioner – every bloodstain, every fiber, the palm print found on the victim's door, the currency found in the defendant's wallet – was tainted by a single, narrow, well-founded risk: that City of York Police Captain (and later chief) William Mobley corrupted the evidence so as to secure petitioner's conviction of this crime.

After arriving at the crime scene in the hours after the attack, Mobley directed two officers already present to leave the premises. *Id.* at 21. He then locked himself in the apartment while he finished collecting and packaging the victim's bedclothes and nightgown and other items later shown to carry stains of the victim's and (in one instance) petitioner's DNA. *Id.* Mobley dusted for fingerprints throughout the residence. Later he testified that he recovered exactly one clear print inside the apartment: a palm print, later identified as petitioner's, that Mobley said he lifted from the inside surface of the exterior door. *Id.* Mobley testified that despite extensive dusting throughout the apartment, he found no other identifiable print *even of the victim herself in her residence of many years*. (Tr. 2485, 2495.)

Later that same day, two rape kits collected from the victim at area hospitals were delivered to Mobley. (Tr. 2240.) These contained several tubes of the victim's blood. (Tr. 2530.) A blood sample drawn from petitioner, by then in custody, likewise was delivered to Mobley. (Tr. 2530.) By this time, too, Mobley had received those items of petitioner's clothing later shown to carry evidence of the victim's DNA, as well as petitioner's wallet, later shown to contain a quantity of currency consistent with what the victim said had been robbed from her. *Holmes*, 605 S.E.2d at 24.

As of the night of the crime, therefore, Mobley had in his exclusive possession *every article of physical evidence ultimately offered in this case*. Petitioner's theory of contamination required only that Mobley rub the victim's bloody clothing against petitioner's (or drip her blood onto petitioner's clothing), that he transfer fibers by rubbing petitioner's clothing against the victim's clothing and sheets, that he lift a palm print of petitioner from someplace in petitioner's jail cell or in a room where he was questioned, and that he adjust the quantity of currency in petitioner's wallet.

For none of these steps would Mobley have required great craft or any assistance. That is, petitioner did not confront the jury with a grand conspiracy to frame him or with a claim of a longstanding vendetta. He argued only that on the night of a strikingly brutal crime in a very small community, the police captain and later chief followed a low-tech route of high temptation to create seemingly potent evidence of petitioner's guilt.

Once he had cast reasonable doubt on the state's forensic evidence, petitioner planned to take the offensive,

showing that someone else – Jimmy White (White) – had actually committed the crime. *Id.* at 22-23. Accordingly, petitioner proffered at a pre-trial hearing an abundance of competent and reliable evidence designed to show that White was the one the state should have been prosecuting. *Id.* At that hearing, *four* witnesses (the proximity witnesses) stepped forward to testify that they saw White in the victim's neighborhood around the time of the crime. *Id.* For example, an eighty-seven year old neighbor of the victim testified that a stranger knocked on her door in the middle of the night saying, "[o]pen the door, my man, *this is Jimmy*, open the door." *Id.* at 22 (emphasis added). As it turned out, the jury heard none of this evidence, even though the trial court said the proximity witnesses were credible. Order re: Third Party Guilt Evidence, at 3-4.

Undeterred, petitioner next proffered *four* additional witnesses (the confession witnesses) who testified that White had made statements incriminating himself and exculpating petitioner. *Holmes*, 605 S.E.2d at 22-23. For example, Ken Rhodes testified that after asking White if the word on the street – that White was the killer – was true, White

> put his head down and he raised his head back up and he said well, you know, I like older women . . . and he never called the lady's name but you know he say that he liked old women and that yeah, he did what they say he did and you know, that somebody else was locked up for it. And you know, it's like he didn't have no regrets about it at all.

Id. at 22. In addition, Rhodes testified that "he [White] told me that he did have sex with the lady. He said but the lady didn't die. She wasn't dead when he left the house. He

said something about a hospital, she was in a hospital and she caught pneumonia and died then and now that they done put a murder rap on Bobby that he was going to burn for something that he didn't really do." Aug. 21, 2000 Hearing Tr. at 89:20-90:2 (emphasis added.)

In addition to the four confession witnesses, the defense also proffered the testimony of a receptionist at the York County Public Defender's Office who said that White had told her not only that he did not believe petitioner was guilty, but also that everyone on the street knew who had really committed the crime. *Id.* at 23. Again, the jury heard none of this evidence. The trial court excluded it, even though again finding it to be credible. Order re: Third Party Guilt Evidence, at 3-4.

White also made an appearance during the pre-trial hearing. *Holmes*, 605 S.E.2d at 23. White denied having committed the crime. *Id.* He could not have committed it, he testified, because he was at home, away from the scene of the crime, when the victim was attacked. *Id.* Although he admitted he was near the victim's neighborhood in the early morning hours before the attack, he said he had been driven home by Joshua Lytle. *Id.* But when Lytle testified, White's alibi evaporated. According to Lytle, he did not drive White home on the evening the victim was attacked. *Id.* White never took the stand at trial. The trial judge refused to permit the defense to call him as a witness. (Tr. 2685.)

In short, petitioner's defense proceeded in two steps. First, he did not assault the victim, and the state's forensic evidence suggesting otherwise was simply not to be believed because it was unreliable, having either been contaminated, or worse, fabricated. Second, and with the

forensic evidence cast in doubt, he sought to present credible evidence implicating White as the true perpetrator. But the trial court never gave petitioner the chance to tell the jury the second half of his story, without which the first half predictably lost almost all of its power to persuade. Juries expect parties to tell a story about what happened that makes sense, a story that possesses "narrative integrity." *See, e.g.*, *Old Chief v. United States*, 519 U.S. 172, 183 (1997). If a party tells a nonsensical story, one lacking integrity, jurors are apt to be incredulous. Stories with big pieces missing – like the story petitioner here had no choice but to tell – make no sense.

The Supreme Court of South Carolina concluded that the trial court had properly excluded all of petitioner's evidence implicating White as the real killer. *Holmes*, 605 S.E.2d at 24. With respect to such evidence of third-party guilt, the court set forth the following rule for admission, drawn from a case decided in 1941:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence

> of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.

State v. Gregory, 16 S.E.2d 532, 534-35 (S.C. 1941) (citing 16 C.J. 560).

The court then cited the holding of *State v. Gay*, 541 S.E.2d 541 (S.C. 2001): "[W]here there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." *Holmes*, 605 S.E.2d at 24. Applying the *Gregory-Gay* holdings, the court found that the forensic evidence pointing to petitioner's guilt – evidence whose reliability petitioner had vigorously contested and challenged throughout the trial – properly precluded the jury from even entertaining the substantial body of evidence he had amassed pointing to White's guilt and hence to his own innocence, evidence the trial court expressly found to be credible. Put simply: if a South Carolina trial court is unimpressed with a defendant's efforts to impeach forensic evidence against him, the court is free to exclude *all* evidence of third-party guilt from ever reaching the jury, no matter how compelling that evidence might otherwise be.

If this Court's decision in *Chambers v. Mississippi*, 410 U.S. 284 (1973), is still good law, the decision of the South Carolina Supreme Court in *Holmes* cannot be permitted to remain undisturbed. If any two cases are indistinguishable, these two are.

The defendant in *Chambers* was arrested for the murder of a local police officer, Aaron Liberty, after an ordeal outside a bar and pool hall. 410 U.S. at 285-86. The weapon used to kill Officer Liberty was a .22-caliber pistol. *Id.* at 286. Chambers was also shot during the incident. Three friends brought the wounded Chambers to a nearby hospital. *Id.* When police learned that Chambers had survived the shooting, he was arrested for the murder of the Officer Liberty. *Id.* at 287.

One of Chambers' three friends that night was a man named Gable McDonald. *Id.* at 286. Several days after the shooting, McDonald gave a sworn and voluntary confession to Chambers' attorneys that he – and not Leon Chambers – had shot Officer Liberty. *Id.* at 287-88. A month later, at Chambers' preliminary hearing, McDonald repudiated his prior sworn confession. *Id.* at 288. In fact McDonald testified that he had not even been at the scene of the shooting. *Id.* Instead, he claimed that he and Berkley Turner were having drinks nearby when they heard the shots. *Id.* He further explained that, though he did indeed own a .22-caliber pistol, he had lost it months earlier. *Id.*

At trial, Chambers tried to introduce evidence showing that McDonald had actually committed the crime. *Id.* at 289. Chambers called McDonald to the stand and successfully introduced McDonald's prior out-of-court confession into evidence. *Id.* at 291. On cross-examination by the state, McDonald testified that he had repudiated this confession. *Id.* Chambers then tried to challenge McDonald's renunciation, but was prevented from doing so when the trial court applied Mississippi's "voucher rule," which prevented a party from impeaching its own witness. *Id.* at 291-92.

Unable to directly challenge McDonald's renunciation of his prior confession, Chambers tried to introduce the testimony of three other witnesses to whom McDonald had confessed. *Id.* at 292-93. After telling the jury that neither he nor McDonald had been in the nearby café at the time of the shooting as McDonald had claimed, Berkley Turner would have told the jury that McDonald had confessed to him. *Id.* Sam Hardin and Albert Carter would also have testified to McDonald's confession. *Id.* But the jury heard none of this testimony, because all of it was excluded under Mississippi's hearsay rules. *Id.* at 293.

The application in this case of South Carolina's rule governing the admissibility of evidence of third-party guilt clearly violates *Chambers*. The facts in *Chambers* are materially indistinguishable from the facts here. In both cases the defendant asserted his innocence throughout. In both cases the third-party perpetrator presented an alibi that later turned out to be false. In both cases witnesses placed the third party in the vicinity of the offense. In both cases the third party had confessed to several people who proffered their testimony. In both cases the third party took the stand and repudiated these prior confessions. In both cases none of the witnesses to whom the third party had confessed was permitted to testify regarding the confession. If the facts in *Chambers* violated due process, then so too do the facts here.

The evidence excluded in *Holmes* was just as reliable and just as fundamental to the defendant's defense as was the evidence excluded in *Chambers*. Without that evidence, petitioner lost the "meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). If no valid evidentiary reason existed to exclude the third-party evidence proffered in *Chambers*,

then no valid reason can exist to exclude the third-party evidence proffered in *Holmes*. Indeed, the exclusion of the third-party guilt evidence in *Holmes* was actually more detrimental to petitioner's defense than was the exclusion of the parallel evidence in *Chambers*. In *Chambers*, McDonald's prior written confession was introduced into evidence, as was other evidence implicating McDonald.[2] In contrast, the jury in *Holmes* heard *no evidence whatsoever* implicating White. Nor should it be forgotten that Chambers was sentenced to life imprisonment; the eighteen-year-old Holmes was sentenced to death.

The problem in *Holmes* is even worse than that in *Chambers* for yet another reason. The Court's opinion in *Chambers* makes no mention of the prosecutor's closing argument. Consequently, we have no idea what, if anything, the prosecutor said about Chambers' claim that McDonald was the perpetrator. In contrast, the prosecutor in *Holmes* first moved successfully to exclude petitioner's evidence of third-party guilt, and then mocked petitioner during closing argument for failing to come forward with witnesses to tell the jury who had committed the crime if not him. "[I]f [the police] are going to frame [someone] . . . , and it's going to be Bobby Holmes, where is this raping, murdering, beating fellow that actually did this thing?"

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[2] Mississippi law permitted Chambers to put on a great deal of evidence of McDonald's guilt. Hence Chambers offered the testimony of a lifelong friend of McDonald who said he saw McDonald shoot Liberty. And a cousin of Liberty "testified that he saw McDonald immediately after the shooting with a pistol in his hand." 410 U.S. at 391. Chambers also offered the testimony of a gun dealer who said that McDonald had bought a .22-caliber revolver of the sort used in the crime about a year before the murder and then bought a different style .22-caliber weapon three weeks after Liberty's death. 410 U.S. at 293 n.5

(Tr. 4220.) The prosecutor cynically asked the question knowing full well that he had taken steps to prevent petitioner from answering it. Such hypocrisy compounds the Due Process violation beyond the error that required reversal in *Chambers*. *Cf. Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam).

One obvious difference between the two cases is the basis upon which the third-party guilt evidence was excluded. In *Chambers* the evidence was excluded under Mississippi's voucher and hearsay rules, whereas in *Holmes* the trial court's exclusion was affirmed on the basis of the *Gregory-Gay* rule, which was specifically designed by the South Carolina courts to deal with third-party guilt evidence. But this difference cuts in favor of petitioner, not against him.

For one thing, despite the voucher and hearsay rules at issue in *Chambers*, Chambers was nonetheless able to present some evidence implicating McDonald, including McDonald's prior written confession. Not so under South Carolina's *Gregory-Gay* rule. Under that rule, any and all evidence of third-party guilt is properly excluded whenever the state's prima facie case can plausibly be characterized as a "strong" one.[3] For another, whereas the voucher and hearsay rules in *Chambers* at least had the virtue of applying equally to the state and the defense, the *Gregory-Gay* rule has the distinct vice of burdening only

[3] The forensic evidence of petitioner's guilt was by no means so strong as to bar his evidence of third-party guilt from raising a reasonable inference as to his own innocence. For petitioner had presented the jury with a single, coherent theory that would have destroyed the significance of all the forensic evidence offered against him, as the dissenting judge in *Holmes* recognized.

the defense. The state escapes its grip. Such asymmetry, the Court has noted, counts as another due process strike against a state evidentiary rule. *See, e.g.*, *United States v. Scheffer*, 523 U.S. 303, 316 n.12 (1998) (citing *Washington v. Texas*, 388 U.S. 14, 22-23 (1967)).

The *Gregory-Gay* rule, applied to the facts of *Chambers*, would have resulted in the exclusion of Chambers' third-party guilt evidence just as surely as did Mississippi's voucher and hearsay rules. The state in *Chambers* presented testimony from at least two deputy sheriffs at the scene of the shooting making Chambers out to be the shooter. *See* 410 U.S. at 286. Surely a trial court could find the eyewitness testimony of two law enforcement officers to be "strong evidence" of Chambers' guilt. If so, then under *Gregory-Gay*, Chambers could not have presented *any* evidence that someone else was the shooter, not even the evidence he was in fact allowed to offer under Mississippi law. The point bears repeating: Under the *Gregory-Gay* rule, once the state presents "strong evidence" of the defendant's guilt, evidence of third-party guilt can be excluded, *no matter how strong that evidence and no matter what the defendant has done to undermine the strength of the state's evidence*. Moreover, the *Gregory-Gay* rule imposes *no obligation whatsoever* on the trial court to assess the probative value of the third-party guilt evidence against any countervailing consideration, such as the risk of wasted time, jury confusion or unfair prejudice to the state. On the contrary, once the state has presented strong evidence of guilt, the defendant is *precluded without more* from mounting a defense based on evidence of third-party guilt, even if such evidence constitutes his best, or indeed his only, defense beyond simply casting doubt on the state's evidence.

A criminal defendant in South Carolina, whose fate for all practical purposes rests on his ability to present evidence that someone else committed the crime, stands no hope of success if the State can preclude such proof merely by persuading the trial judge that the defendant is probably guilty anyway. Under such circumstances the trial judge might just as well direct a verdict in the state's favor.

Holmes is indistinguishable from *Chambers*. Consequently, if the *Chambers* doctrine has any effect whatsoever beyond the facts in *Chambers* itself, the trial court's decision to exclude petitioner's proffered evidence violated Due Process. Petitioner's brief to the South Carolina Supreme Court fully addressed this *Chambers* claim, and he is entitled to the protection *Chambers* affords him. The South Carolina Supreme Court cannot be permitted to flout this Court's historic decision in *Chambers*.

B. The Court Should Grant Certiorari In Order To Clarify The Status And Scope Of The Rule Of *Chambers v. Mississippi*.

The South Carolina Supreme Court's application of the *Gregory-Gay* rule to the facts of petitioner's case plainly violates *Chambers*, whatever the scope of the Court's holding in that case. A grant of certiorari would therefore be warranted on this basis alone. In addition, however, the facts of petitioner's case raise more systemic concerns warranting the Court's attention.

Courts assess the admissibility of evidence of third-party guilt using a wide variety of different standards.

Some states admit evidence of third-party guilt only if it directly connects the third party to the offense charged.[4] Other states admit such evidence subject to an assessment of relevance and prejudice,[5] while others employ a balancing

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[4] *See, e.g.*, *Smithart v. State*, 988 P.2d 583, 586 (Alaska 1999) ("[E]vidence of the third party's guilt is admissible only if the defense can produce evidence that tend[s] to directly connect such other person with the actual commission of the crime charged") (internal quotation omitted); *Birmingham v. State*, 27 S.W.3d 351, 359 (Ark. 2000) ("A defendant may introduce evidence tending to show that someone other than the defendant committed the crime charged, but such evidence is inadmissible unless it points directly to the guilt of the third party."); *People v. Yeoman*, 72 P.3d 1166, 1204 (Cal. 2003) ("[T]here must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.") (internal quotation omitted); *People v. Schwartz*, 678 P.2d 1000, 1009 (Col. 1984) ("[T]he defendant must first offer proof directly connecting the third person with the crime before evidence of that person's opportunity or motive to commit the crime becomes admissible."); *State v. Francis*, 836 A.2d 1191, 1199 (Conn. 2003) ("Third-party suspect evidence is admissible if it *directly* connects the third party to the crime."); *State v. Davidson*, 982 S.W.2d 238, 242 (Mo. 1998) ("Evidence that another person had an opportunity or motive for committing the crime is not admissible without proof that the other person did some act directly connecting that person with the crime.").

[5] *See, e.g.*, *State v. Wilson*, 406 N.W.2d 442, 447 (Iowa 1987) ("The evidence [of third-party guilt] has little or no probative value, but would be highly prejudicial to the State if admitted."); *State v. Fortin*, 843 A.2d 974, 1003 (N.J. 2004) (noting that the trial court properly excluded defendant's evidence that the victim sold drugs the day she was killed to imply that her death was drug related and committed by a third party on the grounds that it was irrelevant); *People v. Primo*, 753 N.E.2d 164, 166-67 (N.Y. 2001) (noting that a ballistics report was relevant evidence insofar as it linked a third person to the offense); *State v. Holterman*, 687 P.2d 1097, 1101 (Or. App. 1984) ("Defendant's testimony only marginally tended to show that another person may have had a motive to commit the crimes . . . [and a]ny probative value was far outweighed by the potential of that testimony to mislead the jury."); *State v. Wright*, 817 A.2d 600, 610 (R.I. 2003) ("[E]vidence of a third person's potential motive or opportunity to commit the crime must

(Continued on following page)

test weighing the interests of the defendant to present a defense and the interests of the state to administer fair and reliable trials.[6] Still other states impose a "reasonable doubt" test, evaluating whether the evidence is of sufficient value to raise a reasonable doubt as to the defendant's guilt.[7] Compared to each of these alternative rules, South Carolina's *Gregory-Gay* rule is the most unforgiving of all, for it permits a trial court to declare a defendant's third-party guilt evidence insufficient as a matter of law to raise a reasonable doubt as to the defendant's guilt once the court deems the state's evidence of guilt sufficiently weighty.

The sheer number of reported cases dealing with the admission of third-party guilt evidence suggests the issue is one arising with some regularity. *See, e.g.*, David McCord, *"But Perry Mason Made it Look So Easy!": The Admissibility of Evidence Offered By a Criminal Defendant to Suggest that Someone Else is Guilty*, 63 TENN. L. REV. 917 (1996) ("[T]here is a voluminous body of case law dealing with the admissibility of evidence offered by a criminal defendant to prove that some other person committed the offense with which the defendant is charged."). Just as regularly, however, the courts adjudicate the

not lead to jury speculation nor improperly open up collateral matters.").

[6] *See, e.g.*, *State v. Luna*, 378 N.W.2d 229, 234 (S.D. 1985) ("[W]e . . . balance the equation . . . by giving due weight to the substantial state interest in preserving orderly trials, and judicial sufficiency, and in excluding unreliable or prejudicial evidence.").

[7] *See, e.g.*, *State v. Conlogue*, 474 A.2d 167, 172 (Me. 1984) ("[E]vidence tending to implicate another person, and deflect guilt from the defendant, must be admitted if it is of sufficient probative value to raise a reasonable doubt as to the defendant's culpability.").

admissibility of such evidence without reference or regard to constitutional concerns, not to mention this Court's decision in *Chambers*. Indeed, the cases leave the distinct impression that in the minds of many courts *Chambers* is simply irrelevant to the decision at hand. The courts tend by and large to apply the jurisdiction's applicable rule of evidence and then move on as if *Chambers* had never been decided.[8] For example, in *none* of the cases decided by the South Carolina Supreme Court involving the admissibility of evidence of third-party guilt has the court once even mentioned *Chambers*, not even in passing.[9]

[8] Few states ever discuss *Chambers* beyond its broad proposition that defendants have a right to present a complete defense. Yet, with respect to the admission of evidence of third-party guilt, New Jersey is alone in its attempt to couch third-party guilt evidence as ultimately a matter of the *Chambers* due process right. *See State v. Koedatich*, 548 A.2d 939, 976 (N.J. 1988) ("[T]he Supreme Court [in *Chambers*] recognized that an accused has a constitutional right under the due process clause of the fourteenth amendment to offer probative evidence tending to show that a third party committed the crime charged."); *see also*, *State v. Reed*, 753 A.2d 1247, 1248 (N.J. 2000) (quoting *Koedatich*); *State v. Fulston*, 738 A.2d 380, 384 (N.J. 1999) (same). In other states, where *Chambers* was cited in third-party guilt cases, the claims were either rejected with little discussion, *see, e.g.*, *State v. Lewis*, 717 A.2d 1140, 1152 (Conn. 1998) (rejecting *Chambers* claim because defendant did not show the third party was unavailable), or the state evidentiary rule did not go so far as to violate the due process right because the court believed the evidence would simply confuse the jury. *See, e.g.*, *Snyder v. State*, ___ So.2d ___, 2003 WL 22463403, at *33 (Ala. Crim. App. 2003) (following *Chambers* but only to the extent that the defendant has a "probative alternative theory of culpability and not an alternative theory that is merely speculative and meant only to confuse the jury") (internal quotation omitted).

[9] *See State v. Gay*, 541 S.E.2d 541 (S.C. 2000); *State v. Beckham*, 513 S.E.2d 606 (S.C. 1999); *State v. Williams*, 468 S.E.2d 626 (S.C. 1996); *State v. Parker*, 366 S.E.2d 10 (S.C. 1988); *State v. Gregory*, 16 S.E.2d 532 (S.C. 1941).

Lower court disregard of, and sometimes for, *Chambers* rests at least in part on the uncertain status and scope of the holding in *Chambers* itself. On the one hand, the Court has continued to invoke and rely on *Chambers* in subsequent cases. Although the Court has never again applied *Chambers* in the context of a case involving the admissibility of evidence of third-party guilt, it has cited *Chambers* in a number of other cases, thus suggesting that the decision has force and application extending to some degree or another beyond the facts in *Chambers* itself. *See, e.g.*, *Rock v. Arkansas*, 483 U.S. 44 (1987) (holding that a rule which excluded all hypnotically refreshed testimony prevented the defendant from fully testifying on his own behalf); *Crane v. Kentucky*, 476 U.S. 683 (1986) (holding the state's exclusion of evidence regarding the circumstances of the defendant's confession deprived the defendant the right to a fair opportunity to present a defense); *Green v. Georgia*, 442 U.S. 95 (1979) (finding the exclusion of a co-defendant's inculpatory statement under state hearsay rules deprived the defendant a fair opportunity to present a defense).

On the other hand, the Court has at the same time suggested that *Chambers* is not to be applied outside the factual context presented in that case. For example, in *Montana v. Egelhoff*, 518 U.S. 37 (1996) (plurality opinion), a plurality of the Court said that "*Chambers* was an exercise in highly case-specific error correction." *Id.* at 52. More recently, the Court emphasized that "*Chambers* specifically confined its holding to the 'facts and circumstances' presented in that case." *Scheffer*, 523 U.S. at 316. Indeed, *Chambers* itself seemed to go out of its way to suggest that the result it reached was *sui generis*, destined never to be repeated. 410 U.S. at 302-03.

The Court should not continue to countenance such debilitating uncertainty, especially with respect to the status and scope of so foundational a decision. The Court's persistent mixed signals do a disservice to the lower courts, which are left in desperate need of this Court's authoritative guidance. Accordingly, a grant of certiorari is warranted in order to settle whether *Chambers* should be understood as nothing more than an exercise in error correction, as some of the Court's post-*Chambers* cases say, or whether it instead should be understood as articulating a principle of constitutional law applicable outside the factual context presented, as some of its other post-*Chambers* cases can be fairly read to suggest.

Moreover, if *Chambers* did indeed articulate a principle of constitutional law, the Court should take the occasion to clarify the content of that principle. For example, if *Chambers* stands for the proposition, as some of this Court's post-*Chambers* cases suggest, that the application of a state evidentiary rule cannot exclude competent and reliable evidence without a "valid justification," *Crane*, 476 U.S. at 690, or without a "sufficient justification," *Egelhoff*, 518 U.S. at 62 (O'Connor, J., dissenting), then the lower courts need additional guidance to determine if and when their respective rules governing the admissibility of evidence of third-party guilt or the application of such rules lack the requisite – but so far ill-defined – justification. Without additional guidance from this Court, the predictable result will be continued and needless chaos, with the cost of that chaos falling squarely on the shoulders of criminal defendants like petitioner. Some courts will do their best to discern *Chambers*' tea leaves, while others will feel at liberty to ignore it with relative impunity, as did the Supreme Court of South Carolina in this case.

IV. CONCLUSION

In addition to the reasons presented by petitioner, the petition for writ of certiorari should be granted for the foregoing reasons.

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(2)

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In the Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE INNOCENCE PROJECT, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Harvey v. Horan, 285 F.3d 298 (4th Cir. 2002) 1

Peek v. State, 488 So. 2d 52 (Fla. 1986) 19

State v. Gay, 541 S.E.2d 541 (S.C. 2001) 6

State v. Gregory, 16 S.E.2d 532 (S.C. 1941) 6

State v. Holmes, 464 S.E.2d 334 (S.C. 1995) 3

State v. Holmes, 605 S.E.2d 19 (S.C. 2004) 4, 6, 15

State v. Munson, 886 P.2d 999 (Okla. Crim. App. 1994) 19

Williamson v. Reynolds, 904 F. Supp. 1529 (E.D. Okla. 1995) 20

Supreme Court Rules

Rule 37.6 1

Other Authorities

Associated Press, *Inmates Freed from Death Row at a Glance*, July 6, 2003, LEXIS, News Library 19

Simon A. Cole, *Fingerprints Not Infallible*, 26 Nat'l L.J. 22 (2004) 13

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Complaint, *Fritz v. City of Ada* (E.D. Okla. Apr. 14, 2000) (No. 2000-CV-194) 7

Complaint, *Ochoa v. City of Austin* (W.D. Tex. Nov. 7, 2002) (No. A02CA710) 10, 11

Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial, Nat'l Inst. Just., Off. Just. Programs, U.S. Dep't Just., NC J161258, *at* http://www.ncjrs.org/pdffiles/dnaevid.pdf (June 1996) 11

James Dao, *In Same Case, DNA Clears Convict and Finds Suspect*, N.Y. Times, Sept. 6, 2003, at A7, 2003 WLNR 5651894 12

Mark Donald, *Lethal Rejection*, Dallas Observer, Dec. 12, 2002, LEXIS, News Library 9

Charlie Goodyear & Erin Hallissy, *The Other Side of DNA Evidence: An Innocent Man Is Freed*, San Francisco Chron., Oct. 19, 1999, at A10, 1999 WLNR 4049356 19-20

Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 Law & Contemp. Probs. 123 (Autumn 1998) 12

Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. Crim. L. & Criminology (forthcoming 2005) (manuscript on file with author) 12, 17, 18

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Martha Bryson Hodel, *Zain Case 'Blueprint' for Convicting the Innocent, Defender Says*, Associated Press, Sept. 3, 2001, LEXIS, News Library 18

Max M. Houck, *Statistics and Trace Evidence: The Tyranny of Numbers*, 1 Forensic Sci. Comms. (1999) 16

Edward Humes, *Crime Scenes Put Under New Microscope*, Orange County Reg., Oct. 17, 2004, LEXIS, News Library 14

Charles T. Jones, *DNA Tests Clear Two Men in Prison*, Daily Oklahoman, Apr. 16, 1999, LEXIS, News Library 7

James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030 (2000) 12

John O'Brien, *Shirley Kinge Lawsuit Rejected; Her Wrongful-Arrest Suit Was Filed Too Late, Judge Rules*, Post-Standard, Sept. 18, 2003, at B1, LEXIS, News Library 14

Plaintiffs' Brief in Support of Summary Judgment Motion, *Fritz v. City of Ada* (E.D. Okla. Jan. 8, 2002) (No. 2000-CV-194) 7, 9

Maurice Possley et al., *Scandal Touches Even Elite Labs*, Chi. Trib., Oct. 21, 2004, at 1, LEXIS, News Library 17, 18

Report of the [Illinois] Governor's Commission on Capital Punishment, Recommendations 50-52, *at* www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf (Apr. 2002) 12-13

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Jonathan Saltzman & Mac Daniel, *Man Freed in 1997 Shooting of Officer*, Boston Globe, Jan. 24, 2004, 2004 WLNR 3621085 13

Barry Scheck & Peter Neufeld, *Junk Science, Junk Evidence*, N.Y. Times, May 11, 2001, at A35, 2001 WLNR 3405176 15

Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution, and Other Dispatches From the Wrongly Convicted* (2000) 2

Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make It Right* (2003) 2, 7

Robert B. Stacey, *Report on the Erroneous Fingerprint Individualization in the Madrid Train Bombing Case*, 54 J. of Forensic Identification 706 (2005) 14

Mark Wrolstad, *Hair-Matching Flawed as a Forensic Science: DNA Testing Reveals Dozens of Wrongful Verdicts Nationwide*, Dallas Morning News, Mar. 31, 2002, at 1A, 2002 WLNR 10578400 9

Rick Young, *The Outcome of the Rampart Scandal Investigations*, P.B.S. Frontline, *at* http://www.pbs.org/wgbh/pages/frontline/shows/lapd/later/outcome.html (last visited Apr. 7, 2005) 18

INTEREST OF *AMICUS CURIAE*[1]

The Innocence Project, Inc. (the "Project") is a nonprofit legal clinic and criminal justice resource center. Founded by Professors Barry C. Scheck and Peter J. Neufeld at the Benjamin N. Cardozo Schoc of Law/Yeshiva University in 1992, the Project provides *pro bono* legal services to indigent prisoners for whom post-conviction DNA testing can provide conclusive proof of innocence. The Project pioneered the litigation model that has exonerated, to date, at least 145 innocent persons through post-conviction DNA testing.

In addition to seeking relief for its clients under state DNA testing statutes, the Project has also served as chief counsel in the leading cases heard in the federal courts to date concerning the federal constitutional right of access to potentially exculpatory DNA evidence.[2] The Project also regularly consults with legislators and law enforcement officials on the state, local, and federal level, conducts research and training, produces scholarship, and proposes a wide range of remedies to prevent wrongful convictions, while continuing its primary work to exonerate individual clients through post-conviction DNA testing.

SUMMARY OF ARGUMENT

DNA testing has exposed deeply rooted, systemic problems with the criminal justice system, demonstrating with unprecedented certainty that more innocent people

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[1] Pursuant to Rule 37.6, *Amicus* certifies that no counsel for a party authored this brief in whole or in part. This brief was written by undersigned counsel. No person or entity other than *Amicus* and its counsel made any monetary contribution to the preparation or submission of this brief.

[2] *See, e.g., Harvey v. Horan*, 285 F.3d 298 (4th Cir. 2002); *Godschalk v. Montgomery County Dist. Attorney's Office*, 177 F. Supp. 2d 366 (E.D. Pa. 2001).

suffer in prison or await execution than most lay citizens and legal scholars imagine.[3] Nonetheless, efforts to exonerate wrongly convicted inmates have often been met with strong resistance from the executive and judicial branches. Many courts, citing procedural defects, have denied these prisoners access to the judicial system, and as a result, potentially thousands of wrongly convicted prisoners will never be able to vindicate their claims of innocence and regain their freedom.

There are many reasons why innocent people are wrongfully convicted. They include false eyewitness identification; false confessions; careless or fraudulent forensic evidence; jailhouse informant testimony; junk science; prosecutorial misconduct; careless and inadequate defense counsel; and racial bias.[4] In a substantial percentage of wrongful conviction cases, the forensic evidence implicating the wrongfully convicted person appears to be strong, but the reliability of the evidence is either substantially weakened or completely undermined by (i) improper evidence collection techniques; (ii) the use of fallible, unscientific forensic analyses; and (iii) police misconduct/evidence planting. In this *amicus* brief, the Project will show that the risk factors present in this case are similar to those found in other wrongful conviction cases.

The Project files this *amicus* brief in support of Bobby Lee Holmes' petition for a writ of certiorari because due process requires that every defendant should have a fair opportunity to present evidence of his or her innocence. Holmes, however, was not given that opportunity. Instead,

[3] DNA exonerations have "laid bare" the "fabric of false guilt." Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution, and Other Dispatches From the Wrongly Convicted* xv (2000).

[4] *See generally* Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make It Right* 163-202 (2003) (hereinafter "*Actual Innocence*").

during both the guilt and the sentencing phases of his trial,[5] Holmes was precluded from presenting evidence of third party guilt, i.e., that another individual - Jimmy White - committed the murder, rape, and burglary of eighty-six-year-old Mary Stewart. Holmes proffered the testimony of fourteen witnesses in support of his third party guilt case: four witnesses testified that White was on the victim's street (where each witness also lived) around the time of the crime;[6] three witnesses testified that White confessed to them that he committed the crime and that Holmes was innocent;[7] three witnesses testified that they heard White admit that Holmes was innocent;[8] three witnesses testified

[5] This was Holmes' second capital trial. Holmes' direct appeal from the first trial was affirmed, *State v. Holmes*, 464 S.E.2d 334 (S.C. 1995), and he was subsequently granted a new trial on post-conviction relief.

[6] Three of these witnesses, Renetta Jamison, Henrietta Gilmore, and Deloris Brown, testified that they saw White walking in the area of the victim's apartment on their street. Third Party Guilt Hr'g (hereinafter "TPG Hr'g"), Aug. 14 Tr. at 87-92, 103-08; TPG Hr'g, Aug. 15 Tr. at 4-9. One witness, Annie Boyd, heard someone knock at her door who identified himself as "Jimmy," although she did not open her door. TPG Hr'g, Aug. 14 Tr. at 163-67.

[7] Stephen Westbrook testified that while he was housed with White at Broad River Correctional Institution, White admitted that he broke into the victim's home and raped her and that Holmes did not commit the crime. TPG Hr'g, Aug. 14 Tr. at 183-89. Mattie Scott testified that White talked about how he had killed and raped the "old lady in York" and that Holmes would fry for it. TPG Hr'g, Aug. 21 Tr. at 49-51. Ken Rhodes, a friend of White's, testified that in 1992 he asked White about the rumor that he was connected to Stewart's death, to which White responded that he broke into the victim's home and raped her and that someone else would be locked up for it. TPG Hr'g, Aug. 21 Tr. at 63-70, 89-90.

[8] Nancy Bennett was employed as a secretary at the Public Defender's Office in 1992, when White was a client and told her "he didn't think [Holmes] was guilty and that he knew maybe who did it." TPG Hr'g, Aug. 14 Tr. at 175-78. Thomas Murray heard White admit that he knew Holmes was innocent and that he was "in jail for nothing." TPG Hr'g, Aug. 21 Tr. at 22-26, 35, 38. John Dixon heard Murray ask White why he did not confess to the crimes, to which White responded "what's done is done" and that it was over. TPG Hr'g, Aug. 15 Tr. at 29-32.

that the jailhouse snitches used by the state were not credible;[9] and one witness impeached White's alibi testimony.[10]

One of the confession witnesses, Stephen Westbrook, also provided testimony regarding the intentional fabrication of forensic evidence against Holmes. Westbrook testified that the Solicitor's Office employees acknowledged to him that they had manufactured underwear evidence (the source of the DNA evidence) incriminating Holmes and that they had lifted one of Holmes' palm prints from the county jail door to use against him in trial. *State v. Holmes*, 605 S.E.2d 19, 23 (S.C. 2004). Westbrook also testified that White told him that Officer Boot Smith cautioned White to keep quiet about his guilt, that Officer Smith was out to "'frame'" Holmes, and that even Holmes' former attorney had urged White to testify against Holmes.[11] *Id.* In addition to this testimonial evidence of third party guilt, the defense proffered the following evidence: (i) a psychological evaluation of White that revealed that he had assaulted women and had sexual fantasies with themes of dominance and control;[12] (ii) evidence that White better fit the description of the attacker given by Stewart;[13] and (iii) White's own testimony, which cast serious doubt on his credibility.[14]

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[9] TPG Hr'g, Aug. 15 Tr. at 43-49, 57-73.

[10] Joshua Lytle testified that he never drove with White around the time of the crime. TPG Hr'g, Aug. 14 Tr. at 125.

[11] Westbrook also testified that two police officers offered to get him out of jail if he would testify (in the first trial) that Holmes had confessed to him. 605 S.E.2d at 23.

[12] TPG Hr'g, Aug. 14 Tr. at 314-16.

[13] Stewart described her attacker as having relatively long hair, but at the time of the attack, Holmes' hair was so short that he was nearly bald, as evidenced by the mug shot taken by the police. Tr. at 2146-54.

[14] For example, White admitted to his violent history with respect to older women and alluded to his recognition of his own guilt: "I asked him [Chief Mobley] would I have to be in court. He say they probably would bring me to court. **And I told him, did he really think I did it.** He say no. I say do they got evidence on him [Holmes]. And he say yeah. Then he told me what all they had. **And I say, do y'all got evidence on me.** He say ain't none of mine match." TPG Hr'g, Aug. 14 Tr. at 322 (emphasis added).

The defense also attacked the credibility of the forensic examinations and the forensic examiners, as well as the integrity of the forensic evidence allegedly linking Holmes to the crime by pointing to the following: (i) the striation pattern of the palm print allegedly lifted from the victim's door did not match the type of pattern that would have come from a smooth surface, but more closely resembled a rough origination surface;[15] (ii) the officers who gathered evidence from the victim's home testified that they placed the evidence in paper bags from the victim's home and did not wear gloves while doing so;[16] (iii) a detective testified that he sifted through all of the evidence from the case simultaneously, including the victim's and defendant's items, without wearing gloves or washing his hands between individual items of evidence;[17] (iv) the state's fiber analyst used the scraping method to obtain fiber samples from both the victim and the defendant in the same room on the same day, despite the fact that the scraping method often leaves fibers in the air that may land on other evidence items;[18] (v) two sets of allegedly "consistent" fibers came from a third source, but the state made no effort to determine the source of the fibers;[19] (vi) the state failed to perform either an Optical Properties Refractive Index test or a chemical analysis of the fibers' dye;[20] (vii) the state lost the victim's blood samples from the rape kit and never tested the DNA found on Holmes' clothing for the preservative

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[15] Tr. at 2898, 3965, 3990-91.

[16] Tr. at 2201-03, 2238.

[17] Tr. at 2559, 2561.

[18] Tr. at 3018, 3020, 3888-89.

[19] Tr. at 3028, 3036, 3038.

[20] Tr. at 3893-96.

known to be in the blood samples;[21] (viii) the evidence log does not describe Holmes' jeans, underwear, or shirt as containing blood stains, while it does describe other items as containing blood stains;[22] (ix) Holmes' own blood sample was sent under the victim's name for testing;[23] and (x) the police never tested the money used to tie Holmes to the crime for fingerprints.[24]

Despite the extensive third party guilt evidence and the flawed forensic evidence, the South Carolina Supreme Court found that, "due to the strong evidence of his guilt," Holmes failed to meet the standard in *State v. Gregory*, 16 S.E.2d 532, 534-35 (S.C. 1941), and *State v. Gay*, 541 S.E.2d 541, 550 (S.C. 2001), for the admission of third party guilt evidence. *Holmes*, 605 S.E.2d at 24. The court found that Holmes could not overcome the "overwhelming" evidence against him to raise a reasonable inference of his own innocence. *Id.* Missing from the court's analysis, however, was the fact that the reliability of some of this "overwhelming" evidence was directly undermined by much of the third party guilt evidence.[25] In light of this crucial omission and its ramifications for Petitioner's claim of innocence, *Amicus* files this brief in support of Petitioner's request for certiorari on the issue of the correct standard for admission of third party guilt evidence.

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[21] Tr. at 2282-85, 3172, 3361, 3372, 3763, 3770.

[22] Tr. at 2619-21.

[23] Tr. at 3370.

[24] Tr. at 3994.

[25] This *amicus* brief does not address the legal arguments that the court below erred in its application of the *Gregory* and *Gay* standards and that such a legal bar to the admission of third party guilt evidence violates a defendant's due process rights. *See Holmes*, 605 S.E.2d at 26 (Pleicones, J., dissenting) (finding that Holmes' proffer met the *Gregory* standard and that *Gay* was distinguishable).

ARGUMENT

I. ABSENT THIS COURT'S INTERVENTION TO PROTECT PETITIONER'S CONSTITUTIONAL DUE PROCESS RIGHT TO PRESENT A DEFENSE, THERE IS A SIGNIFICANT RISK THAT AN INNOCENT MAN WILL BE EXECUTED

A. DNA Testing Has Exonerated Innocent Individuals In Many Cases Where Evidence Of Guilt Appeared "Overwhelming" But Where A Third Party In Fact Committed The Crime

Had Holmes been given the opportunity to present his evidence of third party guilt, the evidence on which he was convicted may have appeared far less "overwhelming" to the trier of fact. Indeed, DNA testing has exonerated many individuals who were convicted on the basis of an apparent wealth of forensic evidence, later found to be false. If these defendants had not been given the opportunity to prove their innocence, they could have spent their lives in prison or been executed, and the perpetrators, who were conclusively matched by these same DNA tests, would have remained free.

1. Ronald Williamson and Dennis Fritz[26]

Six years after a Pontotoc County, Oklahoma girl was raped and murdered, county officials finally "solved" the

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[26] *See* Charles T. Jones, *DNA Tests Clear Two Men in Prison*, Daily Oklahoman, Apr. 16, 1999, LEXIS, News Library; *Actual Innocence*, *supra* note 4; Complaint filed in § 1983 action, *Fritz v. City of Ada* (E.D. Okla. Apr. 14, 2000) (No. 2000-CV-194); Plaintiffs' Brief in Support of Summary Judgment Motion, *Fritz v. City of Ada* (E.D. Okla. Jan. 8, 2002) (No. 2000-CV-194) (hereinafter "Fritz Brief").

case and secured the 1987 convictions of Ronald Williamson, who was sentenced to death, and Dennis Fritz, who received a life sentence. The trial evidence against Williamson and Fritz appeared to be compelling, including detailed testimony from multiple witnesses. These included the account by Glen Gore, one of the state's chief witnesses, who testified that he saw Williamson at the victim's place of employment shortly before her murder; the claim of a female prison inmate that Fritz had confessed in detail to the murder and that she had heard Williamson threaten to harm his mother as he had the victim; testimony that the victim had previously complained to a friend that these two men "made her nervous"; and statements Williamson had made while in police custody about a vivid "dream" he had about the crime. Furthermore, the state's forensic experts testified that *seventeen* hairs from the crime scene "matched" either Williamson or Fritz, and that upon serological analysis, both men were possible contributors of sperm that was recovered from the victim.

After Williamson received a last-minute stay of execution, and Fritz's long-standing efforts to obtain post-conviction DNA testing were successful, DNA results conclusively excluded both men as the source of the semen found in the victim's body. The profile from the semen instead matched Gore's. Further DNA testing also proved that not one of the seventeen hairs deemed to be "matches" with Williamson and/or Fritz at the time of trial (under the microscopic analysis then available) belonged to either. As a result, both defendants were exonerated and released from prison in 1999.

The full scope of the police misconduct and concealed exculpatory and fabricated evidence that tainted the case was broad and deep; the most compelling examples involved Gore, who made a statement confessing to the homicide to an inmate just before he testified at the preliminary hearing as a key prosecution witness, which

was suppressed and never investigated. Gore also made a statement the day after the homicide showing that his accusation four years later about Williamson being at the victim's place of employment bothering the victim was invented. Gore even admitted that he did not offer truthful testimony against Williamson and Fritz and that the suggestion that Williamson was at the victim's place of employment on the night of the incident came from the police. A variety of additional exculpatory evidence later discovered demonstrates the sheer scale of the corruption.[27] The wrongful convictions of Williamson and Fritz demonstrate how easily a complicated web of fabrications and deceit could hide the actual innocence of two men and the overwhelming guilt of another.

2. Christopher Ochoa and Richard Danziger[28]

In 1988, Nancy DePriest was raped and murdered in a Pizza Hut restaurant. Christopher Ochoa, an employee of the Pizza Hut restaurant chain in Austin, Texas, was brought to the police station for questioning a few weeks later. After a long interrogation, Ochoa gave a detailed confession, telling the police that he committed the crime

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[27] For example, statements from seven of fifteen witnesses interviewed who were at the victim's place of employment on the night of the incident were suppressed as it became clear that none of the witnesses would support Gore's story; an inmate stated that he overheard a jailhouse informant swear to make something up as "pure as gold" to incriminate Fritz, just before the informant testified at a preliminary hearing claiming that Fritz confessed; an OSBI report was doctored to eliminate a page that listed witnesses who could undermine claims by a jailhouse informant that Williamson made incriminating statements; and exculpatory hair result tests from one OSBI analyst were suppressed by the testifying analyst. *See* Fritz Brief, *supra* note 26.

[28] *See* Mark Donald, *Lethal Rejection*, Dallas Observer, Dec. 12, 2002, LEXIS, News Library; Mark Wrolstad, *Hair-Matching Flawed as a Forensic Science: DNA Testing Reveals Dozens of Wrongful Verdicts Nationwide*, Dallas Morning News, Mar. 31, 2002, at 1A, 2002 WLNR 10578400.

with his friend, roommate, and fellow employee Richard Danziger. Ochoa pled guilty to the crime and later testified at Danziger's trial. Danziger was convicted on the basis of this testimony, in addition to the expert testimony of a state hair examiner who concluded that a single pubic hair found near the victim's body was microscopically similar to Danziger's. Both men remained in prison for nearly a decade. In February 1998, Achim Marino wrote to then-Governor George W. Bush, confessing to the DePriest murder. Years later, post-conviction DNA testing conclusively exonerated both Ochoa and Danziger by excluding both men as the source of the semen found in the victim's body, while the single DNA profile obtained a perfect match to Marino's.

As revealed later by the civil rights case brought on Ochoa's behalf against the City of Austin and various officers of the Austin Police Department ("APD"), police misconduct was prevalent in all aspects of the DePriest murder investigation, from coercion of Ochoa's confession to concealment of exculpatory evidence.[29] The APD later formed a Joint Task Force to investigate the police misconduct that led to Ochoa's unlawful arrest and conviction, finding that a variety of police customs and policies caused Ochoa to falsely implicate himself and Danziger for a crime they did not commit.[30]

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[29] *See* Complaint filed in § 1983 action, *Ochoa v. City of Austin* (W.D. Tex. Nov. 7, 2002) (No. A02CA710). For example, when Ochoa was taken into police custody for interrogation, he was told he had no right to an attorney and his request for a lawyer was denied. The police then used coercive tactics, such as threatening Ochoa with imminent physical harm, rape by inmates, and the death penalty by needle, to obtain a false confession. Although he stated his innocence to the police, these threats led Ochoa to confess falsely that he was involved in the crimes with Danziger. *Id.*

[30] *See id.* Specifically, the Joint Task Force found that between 1986 and 1992, the APD had a custom and policy of feeding nonpublic information to suspects, using abusive and coercive interrogation methods, and then concealing evidence favorable to the accused; the policymakers and supervisors of the APD and the City of Austin knew about these practices; and the APD failed adequately to train or supervise the homicide detectives. *Id.*

3. Kirk Bloodsworth[31]

Another DNA exoneration in the face of seemingly overwhelming evidence of guilt is that of Kirk Bloodsworth of Maryland, who was convicted and sentenced to death in 1985 for the rape and murder of a young girl. At trial, five eyewitnesses testified that they were certain that Bloodsworth was the man they saw with the victim just prior to her murder; the prosecution presented evidence that the police had received an anonymous call informing them that Bloodsworth was seen with the victim earlier that day; the police testified that during Bloodsworth's first police interrogation, he mentioned a "bloody rock," a weapon used in the crime that was not known to the public at the time; Bloodsworth's acquaintances testified that he said he had done something "terrible" that day; and evidence was presented that a shoe impression found near the victim's body was the same size as Bloodsworth's own.

In 1992, however, Bloodsworth became the first death row inmate in the nation to be exonerated and released based on post-conviction DNA testing, when those tests excluded him as the source of the semen that was found on the young victim's underwear, an autopsy slide, and a stick found near her body. A decade later, after the Project convinced the prosecutors to retest the remaining evidence with DNA technology that would permit the assailant's profile to be entered into state and federal DNA data banks, the sample yielded a data bank "hit" to the DNA profile of

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[31] *See Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, Nat'l Inst. Just., Off. Just. Programs, U.S. Dep't Just., NC J161258, at 35-7, *at* http://www.ncjrs.org/pdffiles/dnaevid.pdf (June 1996).

the true assailant, who was another Maryland inmate serving time for a subsequent attempted rape and murder.[32]

These examples demonstrate the risk of serious error in our criminal justice system, even when the quantity or type of evidence of conviction appears unassailable. The need for caution is particularly acute in heinous capital cases, where emotions run high and where community pressure on police and prosecutors to secure convictions can be acute.[33] Most of all, these cases make clear that no defendant should be unreasonably deprived of his right to prove his innocence through DNA testing or evidence of third party guilt.

B. Post-Conviction DNA Testing Has Shown That The Types Of "Overwhelming Evidence" Cited As Proof Of Petitioner's Guilt - Fingerprint And Fiber Evidence - Can Be Unreliable

Certain types of evidence used by prosecutors in criminal trials are less reliable than others. Jailhouse informants (or "snitches"), for example, have such weighty incentives to offer damning testimony against fellow detainees that diverse coalitions of criminal justice experts have proposed sharply limiting the circumstances under which they may be allowed to testify.[34]

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[32] *See* James Dao, *In Same Case, DNA Clears Convict and Finds Suspect*, N.Y. Times, Sept. 6, 2003, at A7, 2003 WLNR 5651894.

[33] *See* Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. Crim. L. & Criminology (forthcoming 2005) (manuscript at 10 & n.22, on file with author) (hereinafter "Gross Study") (citing Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 Law & Contemp. Probs. 123, 129-33 (Autumn 1998); James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030 (2000)).

[34] *See, e.g., Report of the [Illinois] Governor's Commission on Capital Punishment*, Recommendations 50-52 (urging, *inter alia*, mandatory pretrial admissibility hearings on all informant testimony proffered by the state), *at* www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf (Apr. 2002).

The South Carolina Supreme Court's ruling was explicitly premised on other types of evidence used against Holmes at trial which, despite their apparent persuasive force, have recently been proven by contrary DNA evidence to be unreliable. By resting its decision in part on the "overwhelming" palm print evidence and the fabric fiber evidence that allegedly linked Holmes to the victim and the crime scene, the South Carolina Supreme Court again demonstrated why this Court must be the final arbiter of the Constitution's fundamental guarantees.

1. Emerging Challenges to Fingerprint Analysis

Recent events suggest that fingerprints "are not scientific determinations but opinions based on experience one has developed by looking at fingerprints - opinions, whose overall reliability has never been measured."[35] Just last year, in the case of Stephan Cowans[36] of Massachusetts, post-conviction DNA technology conclusively trumped, for the first time, a reported fingerprint "match" in a criminal case, calling into question not only the case against this individual, but also the continued legitimacy of fingerprint analysis, which has long been relied on to convict thousands of defendants.

Cowans was convicted in 1998 for shooting a Boston police officer while fleeing the scene of a robbery. The evidence against him included not only eyewitness identification by the surviving victim, but also the testimony of two separate fingerprint analysts with the Boston Police Department, each of whom independently

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[35] Simon A. Cole, *Fingerprints Not Infallible*, 26 Nat'l L.J. 22 (2004).

[36] *See* Jonathan Saltzman & Mac Daniel, *Man Freed in 1997 Shooting of Officer*, Boston Globe, Jan. 24, 2004, 2004 WLNR 3621085.

concluded that a single print recovered from the crime scene was a match to Cowans'. In 2004, however, STR-DNA testing yielded a DNA profile wholly inconsistent with Cowans' DNA. The fingerprint was then reanalyzed, and after police concluded that the prior match had been "a mistake" by both analysts, Cowans was exonerated and released.

In the post-9/11 world, with its concomitant pressure to quickly catch and detain terrorists, faulty fingerprint analysis may become more common. Oregon attorney Brandon Mayfield[37] was arrested in May 2004, jailed for two weeks, and labeled a terrorist after *three* top FBI experts mistakenly matched his fingerprints to a print found on bomb-making materials from the Madrid train bombing that killed 191 people in March 2004. Mayfield had never been to Madrid. Spanish experts later determined that the fingerprints matched those of a foreign terrorist. The FBI report[38] analyzing the erroneous fingerprint matches concluded that "[t]he power of the [fingerprint] match, coupled with the inherent pressure of working an extremely high-profile case, was thought to have influenced the initial examiner's judgment and subsequent examination" and "[o]nce the mind-set occurred with the initial examiner, the subsequent examinations were tainted."[39]

As these successful new attacks on fingerprint evidence demonstrate, apparently "strong" forensic

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[37] *See* Edward Humes, *Crime Scenes Put Under New Microscope*, Orange County Reg., Oct. 17, 2004, LEXIS, News Library.

[38] Robert B. Stacey, *Report on the Erroneous Fingerprint Individualization in the Madrid Train Bombing Case*, 54 J. of Forensic Identification 706 (2005).

[39] *Id.* The pressure to solve high-profile cases can also lead to the planting of evidence, as the defense in the Holmes case introduced evidence of the planting of the palm print and the tampering and planting of the blood evidence. *See, e.g.*, John O'Brien, *Shirley Kinge Lawsuit Rejected; Her Wrongful-Arrest Suit Was Filed Too Late, Judge Rules*, Post-Standard, Sept. 18, 2003, at B1, LEXIS, News Library.

evidence that was once considered infallible has resulted in the conviction of innocent defendants. That wrongful convictions resulted in each of these cases despite *multiple* tests of the evidence by forensic analysts lends further credence to Holmes' argument that he should have the opportunity to present evidence of third party guilt and evidence regarding the reliability of the forensic evidence against him.

2. Fiber Analysis

Recently, fiber analysis has been criticized by some forensic experts as a fallible, unreliable form of forensic testing, equivalent to some of the more well-known discredited forensic sciences such as hair analysis,[40] forensic dentistry (where invisible teeth marks in a suspect's skin are matched to a victim's dentistry plates), and bloodhound testimony. In many cases involving these forms of "forensic" science, innocent people have been wrongly convicted.

The South Carolina Supreme Court relied heavily on the fiber evidence against Holmes. According to the court, this allegedly "overwhelming" evidence included: (i) fibers "consistent with" a black sweatshirt owned by Holmes that were found on the victim's bed sheets; (ii) a single blue acrylic fiber that was found on the victim's nightgown and another on Holmes' blue jeans that "'could have come from the same common source or it could have come from different sources, but indeed they do . . . match each other'"; and (iii) "microscopically consistent fibers" that were found on the victim's nightgown and on Holmes' underwear. *Holmes*, 605 S.E.2d at 21-22 (alteration in original). The state's admission that one of the fibers that was allegedly found on the victim's and Holmes' clothes *could have come*

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[40] *See* Barry Scheck & Peter Neufeld, *Junk Science, Junk Evidence*, N.Y. Times, May 11, 2001, at A35, 2001 WLNR 3405176.

from a different source appeared to be irrelevant to the court because the fibers "matched" each other.

"Matching" fibers to prove a defendant's presence at the crime scene has recently been discredited. FBI Supervisory Physical Scientist Max M. Houck, a defender of microscopic hair comparison, has explained why fiber analysis is scientifically imprecise: "The number of different fiber types found on any one textile, such as clothing, therefore, is potentially very large, making it impossible to track each type to its source or sources."[41] Houck explains that because there are so many different types of fiber classes, shapes, dyes, pigments, and fiber manufacturers, the "web of production makes it difficult, if not occasionally impractical, to trace any one product and identify its components to their sources."[42] Although Houck concludes that trace evidence such as fibers often can answer "how" a crime was committed, "trace evidence can rarely tell us who definitively" committed the crime.[43] The South Carolina Supreme Court considered this unreliable fiber evidence as part of the "overwhelming" case against Holmes, even despite the cross-contamination evidence.

II. ADMITTING THIRD PARTY GUILT EVIDENCE IS PARTICULARLY NECESSARY WHEN THERE ARE ALLEGATIONS THAT FORENSIC EVIDENCE HAS BEEN PLANTED OR FABRICATED

The increasing lack of proper scientific methodology in forensic crime labs has played a significant role in

[41] Max M. Houck, *Statistics and Trace Evidence: The Tyranny of Numbers*, 1 Forensic Sci. Comms. (1999).

[42] *Id.*

[43] *Id.*

wrongful convictions.[44] Most troubling are wrongful convictions based on intentional police misconduct, such as evidence fabrication or witness perjury, which have given credence to claims of framing made by defendants.

A. Mass Exonerations Based On Fabricated Evidence

The recent Gross Study of 340 exonerations in the United States from 1989 (the first time DNA exonerated a defendant) through 2003 finds that in 43% of all exonerations, at least one type of perjury (perjury by the police, forensic scientists, or other witnesses for the state) is reported.[45] For murder exonerations, this percentage is 56%, making perjury the leading cause of false convictions for murder.[46] The Gross Study also reports that, out of 340 exonerations, 24 involved perjury by forensic scientists testifying for the government and an additional 5 exonerations involved perjury by police officers.[47] These numbers do not even account for the mass exonerations that have taken place due to large-scale police perjury and corruption.[48] Police and state forensic scientist perjury and fabrication unfortunately are not rare and demonstrate why defendants such as Holmes should be permitted to present such evidence. Some of the most notorious crime lab scandals involved analysts Fred Zain in West Virginia and Joyce Gilchrist in Oklahoma, whose shoddy work and perjury, once discovered, eventually resulted in the exonerations of at least ten defendants and the expenditure

[44] A Chicago Tribune investigation of 200 death row exonerations since 1986 revealed that more than one quarter involved faulty crime lab work or testimony. Maurice Possley et al., *Scandal Touches Even Elite Labs*, Chi. Trib., Oct. 21, 2004, at 1, LEXIS, News Library (hereinafter "Possley").

[45] *See* Gross Study, *supra* note 33, at 20-21.

[46] *Id.* at 20-21, 28.

[47] *Id.* at 20.

[48] *Id.* at 11-12.

of millions of dollars in settlements.[49] Indeed, Gilbert Alejandro was wrongly convicted in part due to Zain's testimony that tied him to the crime when the tests actually absolved him.[50] Alejandro was released in 1994, after new DNA tests established his innocence.

The recent mass exoneration scandals described in the Gross Study (but not included in the data for the study) are even more devastating to the integrity of the criminal justice system. For example, the Rampart CRASH ("Community Resources Against Street Hoodlums") scandal[51] involved widespread police fabrication of arrest reports; the shooting, killing, and wounding of unarmed suspects and innocent bystanders; the planting and fabrication of evidence; and the framing of innocent defendants. The scandal was revealed by Officer Rafael Perez, who provided information on the activities of his fellow CRASH officers in return for a reduced sentence (based on a drug charge). As a result of his testimony, nearly 100 convictions have been overturned.

B. Individual Planting/Fabrication Cases

Cases of individual exonerations due to evidence fabrication are equally compelling. Anthony Peek was convicted and sentenced to death for the murder and rape of an elderly woman in her home. The state offered evidence that two of Peek's fingerprints were lifted from the victim's abandoned car, found near the halfway house where Peek was staying. Blood and semen stains on the victim's sheets were consistent with Peek's identity as a

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[49] *See* Possley, *supra* note 44.

[50] Martha Bryson Hodel, *Zain Case 'Blueprint' for Convicting the Innocent, Defender Says*, Associated Press, Sept. 3, 2001, LEXIS, News Library.

[51] *See* Gross Study, *supra* note 33, at 11; Rick Young, *The Outcome of the Rampart Scandal Investigations*, P.B.S. Frontline, *at* http://www.pbs.org/wgbh/pages/frontline/shows/lapd/later/outcome.html (last visited Apr. 7, 2005).

type-O secretor and a hair similar to Peek's was found in a cut-stocking in the victim's garage. Peek was acquitted at his third retrial, when expert testimony concerning hair identification evidence was proven false.[52]

In *State v. Munson*, 886 P.2d 999 (Okla. Crim. App. 1994), the conviction of Adolph Munson was overturned based on such evidence as the prosecution's deliberate suppression of photographs and reports suggesting Munson was innocent. A criminalist testified that a strand of hair found in Munson's car matched hair samples taken from the victim. Some of the forensic evidence at the trial was provided by Dr. Ralph Erdmann, who later pled guilty to seven felony counts involving autopsies he allegedly performed or failed to perform in other cases.

These cases demonstrate that there are many possible explanations for forensic evidence to match an innocent person: faulty test-taking methods, intentional evidence fabrication, perjury, and contamination of evidence. Holmes should have had the opportunity to present evidence showing the existence of these factors in his case, as well as evidence that another individual committed the crime for which he was charged and convicted. Not only does Holmes have a due process right to such an opportunity, but there is also a significant public safety interest in preventing wrongful convictions.[53]

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[52] *See Peek v. State*, 488 So. 2d 52 (Fla. 1986); Associated Press, *Inmates Freed from Death Row at a Glance*, July 6, 2003, LEXIS, News Library.

[53] For example, in California, DNA from a series of unsolved rapes and murders committed by the unknown "Bedroom Basher" in the late 1970s was finally entered into the state's data bank in 1996. An immediate "hit" led police to the real perpetrator, Gerald Parker, who confessed not only to these crimes, but also to the 1979 beating and rape of a woman named Diana Green, whose husband, Kevin, had been convicted and imprisoned. After DNA from the case was tested and found consistent with Parker's, Kevin Green (whose earlier pleas for DNA testing before Parker's confession had fallen on deaf ears) was finally exonerated and freed in 1996. *See* Charlie Goodyear & Erin Hallissy, *The Other Side of*

CONCLUSION

In an epilogue to his decision vacating Ronald Williamson's conviction, Chief Judge Frank Seay wrote:

> While considering my decision in this case I told a friend, a layman, I believed the facts and law dictated that I must grant a new trial to a defendant who had been convicted and sentenced to death.
>
> My friend asked, "Is he a murderer?"
>
> I replied simply, "We won't know until he receives a fair trial."
>
> God help us, if ever in this great country we turn our heads while people who have not had fair trials are executed. That almost happened in this case.
>
> ACCORDINGLY, the Writ of Habeas Corpus shall issue . . . .

Williamson v. Reynolds, 904 F. Supp. 1529, 1576-77 (E.D. Okla. 1995). For the foregoing reasons, the Project urges the Court to grant the writ of certiorari.

DNA Evidence: An Innocent Man Is Freed, San Francisco Chron., Oct. 19, 1999, at A10, 1999 WLNR 4049356.

Respectfully submitted,

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April 11, 2005

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No. 04-1327

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

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Feb. 24, 1992 – Amended Indictment for Robbery, State of South Carolina; Amended Indictment for Murder, State of South Carolina

Apr. 12, 1993 – Criminal trial of Bobby Lee Holmes, South Carolina Court of General Sessions, Sixteenth Judicial Circuit

Apr. 16, 1993 – Jury verdict against Bobby Lee Holmes, South Carolina Court of General Sessions, Sixteenth Judicial Circuit

Apr. 19, 1993 – Capital sentence against Bobby Lee Holmes, South Carolina Court of General Sessions, Sixteenth Judicial Circuit

Nov. 27, 1995 – Opinion and judgment on direct appeal, Supreme Court of South Carolina

June 10, 1996 – Denial of Petition for Certiorari, U.S. Supreme Court

Jan. 14, 1998 – Order granting post-conviction relief, South Carolina Court of General Sessions, Sixteenth Judicial Circuit

Aug. 14-15, 2000 – Pretrial hearing on admissibility of third-party guilt evidence, South Carolina Court of General Sessions, Sixteenth Judicial Circuit

Aug. 17, 2000 – Amended Indictment for Robbery, State of South Carolina; Amended Indictment for Criminal Sexual Misconduct, State of South Carolina

Aug. 21, 2000 – Pretrial hearing on admissibility of third-party guilt evidence, South Carolina Court of General Sessions, Sixteenth Judicial Circuit (continued)

Aug. 23, 2000 – Order denying admissibility of third-party guilt evidence, South Carolina Court of General Sessions, Sixteenth Judicial Circuit

Mar. 12, 2001 – Criminal trial of Bobby Lee Holmes, South Carolina Court of General Sessions, Sixteenth Judicial Circuit

Mar. 17, 2001 – Denial of motion for reconsideration on admissibility of third-party guilt evidence, delivered from the bench, without prejudice, South Carolina Court of General Sessions, Sixteenth Judicial Circuit

Mar. 19, 2001 – In camera hearing on use of third-party guilt evidence to impeach the investigation, South Carolina Court of General Sessions, Sixteenth Judicial Circuit

Mar. 21, 2001 – Denial of motion for reconsideration on admissibility of third-party guilt evidence, delivered from the bench at the close of State's evidence, South Carolina Court of General Sessions, Sixteenth Judicial Circuit

Mar. 23, 2001 – Jury verdict against Bobby Lee Holmes, Sixteenth Judicial Circuit

Mar. 25, 2001 – In camera hearing on use of third-party guilt evidence during sentencing, South Carolina Court of General Sessions, Sixteenth Judicial Circuit

Mar. 28, 2001 – Capital sentence against Bobby Lee Holmes, South Carolina Court of General Sessions, Sixteenth Judicial Circuit

Nov. 1, 2004 – Opinion and judgment on direct appeal, affirming the verdict and sentence, Supreme Court of South Carolina

Dec. 1, 2004 – Order denying petition for rehearing, Supreme Court of South Carolina

Mar. 31, 2005 – Petition for Certiorari, U.S. Supreme Court

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STATE OF SOUTH CAROLINA	)	COURT OF GENERAL SESSIONS
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
	)	VOLUME I
THE STATE, PLAINTIFF,	)	TRANSCRIPT OF RECORD
VERSUS	:	90-GS-46-1196
BOBBY LEE HOLMES, DEFENDANT.	)	90-GS-46-1197
	:	90-GS-46-1198
	)	90-GS-46-1200
	:	AUGUST 14, 2000
	)	YORK, SOUTH CAROLINA

BEFORE:

THE HONORABLE JOHN C. HAYES III, JUDGE

APPEARANCES:

FOR THE STATE:

THOMAS E. POPE, ESQ., SOLICITOR
KEVIN S. BRACKETT, ESQ., DEPUTY SOLICITOR
WALTER W. THOMPSON, ESQ., ASSISTANT SOLICITOR

FOR THE DEFENSE:

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JAMES W. MORTON, ESQ.
MARK J. MacDOUGALL, ESQ.
ELIZABETH R. YANG, ESQ.

* * *

[Pretrial Hearing on Admissibility of
Defendant's Third Party Guilt Evidence]

[Defense Witness Frenetta Jamison –
Direct Examination by Mr. MacDougall*]

[88] Q WE'LL TRY TO GET THROUGH THIS AS QUICKLY AS WE CAN. I'D LIKE TO TAKE YOU BACK TO 1989. WHERE DID YOU RESIDE IN 1989, DURING THE MONTH OF DECEMBER?

A I LIVED AT 18 PECAN CIRCLE, CALIFORNIA STREET.

Q DID YOU KNOW AN INDIVIDUAL NAMED MARY STEWART?

A I HAD KNOWN HER, YES, I DID, SIR.

Q AND DID YOU KNOW HER AS A NEIGHBOR?

A YES SIR. SHE . . . YES SIR.

Q AND DO YOU REMEMBER THE PERIOD OF TIME IN WHICH MRS. STEWART WAS ATTACKED?

A AT THE TIME SHE WAS ATTACKED?

Q RIGHT, THE MONTH OF DECEMBER?

A WELL, THE DAY, THAT MORNING I WAS COMING HOME I SAW MR. WHITE.

Q WELL, I'LL TAKE YOU THROUGH THAT AND I'LL ASK YOU SOME SPECIFIC QUESTIONS. SPECIFICALLY, ON DECEMBER 31, 1989, DO YOU RECALL

---

* Any typographical and/or incorrect punctuation found in the following Joint Appendix pages were intentionally left to show accurately how the original documents appeared.

WHERE YOU WERE THAT EVENING AND [89] EARLY MORNING?

A I WAS COMING FROM CLYDE THOMPSON WEST END GRILL.

Q CAN YOU TELL ME WHAT KIND OF PLACE THAT IS?

A IT'S A CLUB, A NIGHTCLUB.

Q AND DO YOU RECALL WHAT TIME YOU LEFT?

A IT WAS BETWEEN ABOUT FOUR-THIRTY, FIVE-THIRTY IN THE MORNING.

Q BETWEEN FOUR-THIRTY AND FIVE-THIRTY?

A YES SIR.

Q AND WHEN YOU LEFT CLYDE'S WHERE DID YOU GO?

A I WENT TO A CONVENIENCE STORE CALLED, AT THE TIME IT WAS, THAT WAS MR. G's. I LEFT THERE AND I WAS COMING BACK UP CALIFORNIA STREET ON MY WAY HOME TO 18 PECAN CIRCLE.

Q WHERE IS MR. G's LOCATED?

A GOING SOUTH ON 321.

Q IS IT ON YOUR WAY FROM CLYDE'S?

A YES, IT IS.

Q AND YOUR RESIDENCE, YOUR HOME AT 18 PECAN CIRCLE, WHERE WAS THAT IN RELATION – HOW FAR AWAY WAS IT FROM MRS. STEWART'S HOME?

A FROM HERE TO THAT BACK DOOR.

Q FROM HERE TO THAT BACK DOOR.

MR. MacDOUGALL: I WOULD ASK THE COURT TO NOTE FOR THE RECORD THAT WE'RE TALKING ABOUT A DISTANCE OF [90] PROBABLY FORTY FEET.

Q IS THAT ABOUT RIGHT, MS. JAMISON?

A YES.

Q WHEN YOU LEFT – IS IT MR. G's?

A YES.

Q WHEN YOU LEFT MR. G's, WHERE'D YOU GO?

A I COME BACK UP THE WAY AND COME BACK UP CALIFORNIA STREET.

Q COMING BACK UP CALIFORNIA STREET, DO YOU PASS –

A THAT'S LIKE COMING FROM CLYDE'S.

Q AND DID YOU PASS MRS. STEWART'S HOME WHEN YOU DID THAT?

A YES, I DID.

Q AND WHAT DID YOU SEE?

A AS I WAS COMING HOME I SAW MR. WHITE GOING UP THE HILL, GOING TO THE APARTMENTS, BUT WHOSE HOUSE HE WENT AT I DO NOT KNOW.

Q WHAT'S MR. WHITE'S FIRST NAME?

A JIMMY, AS I KNOW IT.

Q AND HOW DID YOU KNOW JIMMY WHITE?

A I'VE BEEN KNOWING HIM FOR SOME YEARS.

Q AND YOU RECOGNIZED HIM AS JIMMY WHITE?

A YES, I DID.

Q AND DID YOU SPEAK TO HIM?

A NO, I DID NOT.

[91] Q WAS THERE ANYONE WITH YOU AT THE TIME?

A I WAS WITH MY BOYFRIEND, EX–BOYFRIEND.

Q WHAT'S HIS NAME?

A STANLEY MEEKS.

Q AS YOU PASSED MR. WHITE WHERE WAS HE?

A HE WAS ON THE SIDE OF THE ROAD AS I WAS TURNING IN TO GO TO MY HOME. HE WAS GOING UP THE HILL TO THE APARTMENTS.

Q TO WHICH APARTMENTS?

A AS, LIKE, YOU'RE GOING TO MRS. STEWART'S WHERE SHE LIVED AT. BUT I DON'T KNOW IF HE WENT IN OR NOT.

Q SURE. BUT IN THE DIRECTION OF MRS. STEWART'S APARTMENT?

A YES.

Q ABOUT WHAT TIME DID THIS TAKE PLACE?

A LIKE I SAID, SIR, FROM FOUR-THIRTY TO SOMETHING TO FIVE THAT MORNING.

Q AND YOU AND YOUR BOYFRIEND THEN WENT TO YOUR HOME?

A YES SIR.

Q AND WHEN DID YOU NEXT LEAVE YOUR HOME?

A THE NEXT NIGHT.

Q THE NEXT NIGHT?

A UH-HUH.

Q WHAT WAS MR. WHITE WEARING AT THE TIME?

A I DO NOT KNOW, SIR.

[92] Q DO YOU RECALL ANYTHING ABOUT HIS, WHAT HE WAS WEARING OR HOW HE LOOKED?

A NO SIR.

Q HE WAS JUST WALKING?

A YES SIR.

* * *

[Defense Witness Meshelley Gilmore –
Direct Examination by Mr. MacDougall]

[104] Q I'D LIKE YOU TO GO BACK TO DECEMBER 30 AND 31 OF 1989. DO YOU RECALL THAT NIGHT?

A YES.

Q AND AS THAT EVENING WORE ON, I'M TALKING SPECIFICALLY ABOUT THE TIME GETTING TOWARD MIDNIGHT AND AFTER, WHAT WERE YOU DOING?

A ME AND MY BOYFRIEND HAD HAD AN ARGUMENT.

Q WHERE WERE YOU WHEN YOU HAD THE ARGUMENT?

A AT MY PLACE WHERE I LIVED, 28 PECAN CIRCLE AT THE APARTMENT.

Q AND WHAT WAS YOUR BOYFRIEND'S NAME?

A STEVIE GOOD.

Q WOULD YOU SPELL THAT FOR ME?

A S-T-E-V-I-E.

Q WHAT TIME DID THAT ARGUMENT BEGIN?

A ONE-THIRTY, MAYBE TWELVE-THIRTY, ONE THIRTY.

Q SOMETIME AFTER MIDNIGHT?

A YEAH.

Q AS THE ARGUMENT WORE ON, WHAT HAPPENED?

A HE LEFT THE APARTMENT AND I LEFT TO TRY TO FIND HIM.

Q ABOUT WHAT TIME DID HE LEAVE?

A ABOUT THREE-THIRTY, FOUR O'CLOCK IN THE MORNING.

Q DID HE LEAVE ON FOOT OR WAS HE DRIVING?

A HE LEFT ON FOOT.

[105] Q HOW MUCH TIME PASSED BETWEEN HIS LEAVING THE HOME AND YOU GETTING UP AND FOLLOWING HIM?

A ABOUT TEN OR FIFTEEN MINUTES.

Q WERE YOU BY YOURSELF AT THE TIME?

A YES.

Q WHEN YOU LEFT TO GO LOOK FOR YOUR BOYFRIEND WHERE DID YOU GO?

A I RODE DOWN THROUGH CENTER STREET. I WAS JUST RIDING, JUST LOOKING FOR HIM.

Q WAS THERE ANY PARTICULAR PLACE YOU THOUGHT HE MIGHT BE?

A YEAH, ONE PLACE ON CENTER STREET.

Q AND WHEN YOU CAME OUT, AND WE'LL TALK ABOUT THIS LATER. PECAN CIRCLE IS WHERE IN RELATION TO CALIFORNIA STREET?

A (NO RESPONSE)

Q IF I'M DRIVING ALONG CALIFORNIA STREET AND THE PECAN CIRCLE AREA IS ON MY LEFT?

A YES.

Q HOW DO I GET IN THERE? IS THERE A PARKING LOT OR A COURTYARD?

A THERE'S A PARKING LOT.

Q WHEN YOU LEFT THE APARTMENT DID YOU SEE ANYONE?

A JIMMY WHITE, I SAW HIM OUT IN THE PARKING LOT.

Q AND YOU SAID THIS WAS HOW LATE AT NIGHT?

[106] A ABOUT THREE-THIRTY OR FOUR O'CLOCK.

Q AND HOW DID YOU KNOW JIMMY WHITE?

A I JUST KNOW HIM. I KNOW HIM.

Q HOW LONG HAVE YOU KNOWN HIM?

A AT THE TIME I WAS ONLY SIXTEEN. SO I GUESS I KNOW HIM TWO OR THREE YEARS BEFORE THEN.

Q AND DID YOU TALK TO MR. WHITE AT ALL?

A NO.

Q HOW LONG WERE YOU GONE FROM THE APARTMENT THAT MORNING?

A THIRTY MINUTES, MAYBE FORTY-FIVE MINUTES.

Q SO THAT WOULD TAKE US TO ABOUT WHAT TIME?

A WELL, ABOUT FOUR-THIRTY, FIFTEEN TO FIVE.

Q AND DID YOU RETURN HOME IN THAT CAR AS WELL?

A YES.

Q WERE YOU BY YOURSELF?

A YES.

Q SO, YOU DIDN'T FIND YOUR BOYFRIEND?

A NO.

Q WHEN YOU RETURNED DID YOU SEE ANYBODY THERE AT THAT TIME?

A JIMMY WHITE WAS STILL IN THE PARKING LOT.

Q WHERE WAS HE IN THE PARKING LOT IN RELATION TO YOUR APARTMENT?

A MY CAR WAS PARKED HERE AND THERE WERE MAYBE TWO [107] OR THREE CARS PARKED, AND HE WAS STANDING RIGHT IN FRONT OF THOSE CARS OVER THERE.

Q SO, ABOUT HOW FAR AWAY WERE YOU?

A NOT EVEN THIRTY FEET, MAYBE.

Q DID HE LOOK AT YOU?

A YEAH.

Q AND YOU SAW HIM?

A YES.

Q WHAT DID YOU DO WHEN YOU RETURNED BACK TO THE PARKING LOT AT PECAN CIRCLE AND SAW JIMMY WHITE?

A I SAT IN MY CAR UNTIL HE COULD SORT OF MOVE AWAY ENOUGH FOR ME TO JUST RUN IN THE HOUSE.

Q WHAT WAS HE DOING?

A HE WAS JUST LINGERING AROUND IN THE PARKING LOT.

Q DO YOU RECALL WHAT HE WAS WEARING THAT DAY?

A I DON'T.

Q DO YOU RECALL WHAT HIS HAIR LOOKED LIKE?

A HE HAD LONG HAIR.

Q BUT HOW LONG?

A ABOUT LIKE THAT, PEOPLE CALL IT A SHAG.

Q A SHAG HAIRCUT?

A A SHAG HAIRCUT.

Q WHEN YOU WENT BACK IN YOUR HOME WHAT DID YOU DO?

A WENT TO SLEEP UNTIL I GOT A KNOCK ON THE DOOR.

Q WHAT TIME WAS THAT?

[108] A SEVEN-THIRTY.

Q WHO WAS KNOCKING ON YOUR DOOR?

A A POLICE OFFICER. I'M NOT SURE OF HIS NAME.

Q WHAT DID THE POLICE TELL YOU?

A HE ASKED ME HAD I SAW ANYBODY OUT IN THE PARKING LOT THAT NIGHT. AND I TOLD HIM, YES, I HAD SAW JIMMY WHITE YOU THERE THAT NIGHT.

Q DID YOU SEE ANYBODY ELSE IN THE PARKING LOT THAT NIGHT?

A NO.

Q DID YOU SEE THE DEFENDANT IN THIS CASE, AND LET ME GET OUT OF HIS WAY, BOBBY LEE HOLMES IN THE PARKING LOT THAT NIGHT?

A NO.

* * *

[Joshua Lytle – Cross Examination By Mr. Pope]

[128] Q SO, THAT NIGHT – LET ME ASK YOU THIS, I'VE BEEN LOOKING AT YOUR STATEMENT WHERE YOU HAD ACTUALLY GIVEN A STATEMENT, LIKE, IN APRIL THAT YEAR FOLLOWING. DO YOU KNOW WHAT I MEAN? LIKE, THIS HAPPENED RIGHT AT THE END OF '98. IS THAT RIGHT? I'M SORRY, '89. AND YOU GAVE A STATEMENT IN, LIKE, APRIL OF '90. DO YOU REMEMBER THAT, [129] SIGNING A STATEMENT?

A THE ONLY STATEMENT I GIVE IS WHEN IT HAPPENED.

MR. POPE: YOUR HONOR, CAN I HAVE THE COURT'S EXHIBIT?

Q MR. LYTLE, LET ME SHOW YOU, AND I'LL GET YOU A COPY OF IT. DO YOU SEE THAT, MR. LYTLE? IS THAT YOUR SIGNATURE RIGHT THERE?

A UH-HUH.

Q LET ME SHOW IT TO THE DEFENSE AND I'LL BE RIGHT BACK, OKAY?

A OKAY.

MR. POPE: YOUR HONOR, THIS IS THE ONLY COPY I HAVE WITH ME RIGHT NOW. I'M GOING TO CROSS HIM ON THIS AND THEN I'LL GET A COPY FOR THE COURT.

A MR. LYTLE, THIS SAYS APRIL 7 OF 1990. DO YOU REMEMBER COMING IN AND SIGNING THAT STATEMENT?

A WHEN HE CAME OVER TO THE HOUSE?

Q IS THAT WHAT HAPPENED?

A I DON'T KNOW.

Q YOU'RE WELCOME TO LOOK AT IT. IF IT'LL HELP YOU, I'LL GO THROUGH IT AND YOU TELL ME IF THAT'S WHAT YOU RECALL, AND THEN WE'LL COME BACK AND TALK ABOUT WHEN YOU SIGNED IT. IS THAT OKAY?

A (NO RESPONSE)

Q DO YOU NEED TO LOOK AT IT SOME MORE?

[130] A OKAY, OKAY. THAT'S THE . . .

Q I'M SORRY, SIR?

A IT WAS, I BELIEVE IT WAS ABOUT THREE OF THEM COME AND TALK TO ME ABOUT THIS, ABOUT THAT CASE.

Q NOW, WHEN YOU SAY THREE OF THEM COME AND TALKED TO YOU ARE YOU TALKING ABOUT RECENTLY OR ARE YOU TALKING ABOUT BACK THEN?

A NOT BACK THEN WHEN IT FIRST HAPPENED. MAYBE ABOUT A COUPLE OR THREE MONTHS AGO.

Q THREE MONTHS AGO FROM RIGHT NOW?

A YEAH.

Q SO, A COUPLE OR THREE PEOPLE CAME AND TALKED TO YOU ABOUT THREE MONTHS AGO ABOUT IT?

A YEAH, THE SAME CASE.

Q OKAY. WHO WAS THAT, DO YOU KNOW?

A I CAN'T REMEMBER. I CAN'T REMEMBER THEY NAME.

Q WHO WERE THEY WORKING FOR, DO YOU KNOW?

A NO, I DON'T.

Q BUT THIS IS SOMETHING, THIS IS FROM BOOT SMITH. JAMES SMITH, WE KNOW THAT'S BOOT SMITH, RIGHT?

A UH-HUH.

Q BACK IN APRIL 7 OF '90. LET ME ASK YOU, THIS IS WHEN HE CAME AND HE GOT A WRITTEN STATEMENT FROM YOU. I'LL READ IT THROUGH AND THEN YOU LOOK AT IT AND SEE IF YOU RECALL IT. OKAY?

[131] A OKAY.

Q YOU'VE GOT YOUR BROTHER'S PHONE NUMBER ON HERE. THAT'S WHAT YOU GAVE THEM TO GET IN TOUCH WITH YOU.

A HOW THEY COULD GET IN TOUCH WITH ME.

Q AND HE'S TALKING TO YOU ABOUT SATURDAY, THE 30TH AND THEN SUNDAY, THE 31ST. IS THAT RIGHT? BACK IN '89, THAT'S WHAT Y'ALL WERE TALKING ABOUT?

A OKAY.

Q IT SAYS "ON SATURDAY, 12/30/89 I CAME TO YORK AROUND ABOUT TEN P.M. I WENT TO THE SHACK."

NOW, THE SHACK, IS THAT SOMEWHERE, CAN YOU DRINK A BEER DOWN AT THE SHACK?

A YEAH, THE SECOND TIME I DID.

Q I'M SORRY?

A THE SECOND TIME I WAS THERE.

Q DID YOU HAVE A BEER WHEN YOU WERE THERE AT THE SHACK?

A YEAH, WHEN I WAS THERE THE SECOND TIME.

Q OKAY. SO, YOU'RE DOWN AT THE SHACK. THAT'S DOWN IN SHARON?

A UH-HUH.

Q SO, YOU'RE DOWN AT THE SHACK IN THE EVENING DOWN THERE BEFORE YOU'RE KINDA HEADING ON OUT TO GO TO CLYDE'S AND EVERYTHING, RIGHT?

A YEAH.

[132] Q WAS THERE A BUNCH OF FELLOWS DOWN THERE AT THE SHACK?

A UH-HUH.

Q IS IT A KIND OF A STORE OR IS IT A CLUB? WHAT IS IT?

A IT'S A CLUB.

Q DID YOU SEE JIMMY WHITE DOWN THERE?

A YEAH.

Q SO, HE WAS DOWN AT THE SHACK AND YOU SAW HIM DOWN THERE AT THE SHACK?

A UH-HUH.

Q THE SHACK'S RIGHT UP THE ROAD FROM YOUR HOUSE?

A YEAH, WHEN I WAS STAYING OUT THERE.

Q SO, YOU KNOW JIMMY WHEN HE WAS GROWING UP, WHEN HE WAS EIGHT OR NINE, AND HE WAS A YOUNG BOY AND HE WOULD COME OUT THERE AND STAY WITH MRS. McCAW, RIGHT?

A UH-HUH.

Q SO, HE WAS DOWN THERE AT THE SHACK DOWN THERE AT SOME POINT DRINKING DOWN THERE, TOO?

A YEAH.

Q OKAY. SO, AT SOME POINT YOU DECIDE TO COME ON TO CLYDE'S?

A YEAH.

Q LET'S SEE. YOU HAD ACTUALLY SEEN – AND, AGAIN, I'M JUST TAKING FROM THIS. AND YOU'RE WELCOME ANYTIME TO [133] TAKE A LOOK AT THIS TO JUST TELL ME.

"THE SHACK'S RIGHT UP THE ROAD FROM MY HOUSE. I SEEN JIMMY AT MY HOUSE THAT MORNING." AND THEN YOU SAY YOU SAW HIM THERE AT THE SHACK. EVERYBODY THERE AT THE SHACK DRINKS. I MEAN, JIMMY DRINKS, DON'T HE?

A YEAH.

Q OKAY. AND YOU LEFT THE SHACK AND WENT TO THE RED CARPET, WHICH IS IN YORK. NOW, THE RED CARPET, WHERE IS THAT IN RELATION TO CLYDE'S?

A YOU COME ON UP THERE ON THE BY-PASS AND IT'S UP THERE.

Q IS IT UP FROM CLYDE'S ON 321?

A YEAH, ON 321.

Q OKAY. IS IT ON FURTHER AWAY FROM SHARON?

A OH, YEAH. I'M UP IN YORK.

Q YEAH, THAT'S WHAT I MEAN. BUT I MEAN, WHEN YOU'RE COMING, YOU'RE GET TO CLYDE'S. COMING FROM SHARON, YOU GET TO CLYDE'S BEFORE YOU GET TO THE RED CARPET. THE RED CARPET'S FURTHER, RIGHT?

A YEAH.

Q OKAY. AND SO, EARLIER YOU WERE SAYING, LET'S SEE, THAT YOU LEFT AND YOU WENT TO CLYDE'S AND THEN YOU WENT TO THE RED CARPET.

SO, YOU WENT TO THE SHACK AND YOU HAD SOME BEER AND THEN JUST WENT, WERE GOING OUT FOR THE EVENING. YOU [134] WEREN'T WORKING THAT NIGHT?

A NO, HUH-UH.

Q HERE YOU SAY YOU LEFT THE SHACK AND WENT TO THE RED CARPET IN YORK AND YOU WERE BY YOURSELF AND YOU DROVE YOUR CAR. LATER YOU SAW MICHAEL BURKIN.

NOW, WHO IS MICHAEL BURKIN?

A THAT MY COUSIN.

Q NOW, DO YOU KNOW BOBBY HOLMES?

A I KNOW HIS DADDY.

Q HOW DO YOU KNOW HIS DADDY?

A WE BEEN GROWING UP TOGETHER. I KNEW HIM WHEN HE WAS GROWING UP.

Q OKAY, SO YOU KNOW HIS DADDY. HAVE YOU TALKED TO HIS DADDY ABOUT THIS?

A HUH-UH.

Q THE ONLY FELLOWS AS FAR AS THEM THAT YOU HAVE TALKED TO WAS THOSE GUYS THREE MONTHS AGO, YOU SAID?

A YEAH, I TALKED TO THEM ABOUT THREE MONTHS AGO.

Q ALL RIGHT. SO, YOU SAW MICHAEL AT THE RED CARPET ABOUT TWENTY MINUTES LATER. AND THE RED CARPET CLOSED AT MIDNIGHT ON SATURDAY NIGHT. IS THAT RIGHT?

A YEAH.

Q BUT THEN CLYDE'S STAYS OPEN ABOUT ALL NIGHT, DON'T THEY?

A YEAH.

[135] Q OKAY. SO YOU DRUNK A FEW BEERS. THEN DID YOU GO BACK TO CLYDE'S FROM THE RED CARPET?

A NO.

Q IT SAYS HERE THAT YOU LEFT THE SHACK AND WENT TO THE RED CARPET AND YOU WERE BY YOURSELF. AND THE CARPET CLOSED AT MIDNIGHT, OKAY.

NOW, IS CLYDE THOMPSON'S PLACE, IS THAT CLYDE'S?

A IT'S ANOTHER ONE.

Q IS IT THE SAME THING?

A IT'S PART OF THE SAME THING, THE RED CARPET, THE WEST END GRILL OR SOMETHING LIKE THAT.

Q THE WEST END GRILL IS THE SAME AS THE RED CARPET OR THE WEST END GRILL IS THE SAME AS CLYDE'S?

A NO, THEY NOT THE SAME THING.

MR. MacDOUGALL: YOUR HONOR, WE HAVE A COUPLE OF EXTRA COPIES WE'VE JUST LOCATED, IF IT'LL MAKE IT EASIER.

THE COURT: THANK YOU.

Q WILL THIS HELP YOU OUT, MR. LYTLE? TAKE THIS ONE. DO YOU NEED A SECOND LOOK AT IT OR ARE YOU READY FOR ME TO ASK QUESTIONS?

A I'M READY.

Q YOU WERE SAYING THE WEST END GRILL – I'M NOT SURE I UNDERSTAND. THE WEST END GRILL IS –

A THAT'S THE NAME OF IT. I DON'T KNOW. THEY SAID [136] THAT IT'S THE RED CARPET, BUT I DON'T KNOW. ALL I KNOW IS IT'S THE CARPET.

Q OKAY. NOW, WHAT IS CLYDE THOMPSON'S? IS THAT THE SAME AS CLYDE'S? IS THAT WHAT CLYDE'S IS?

A ALL I KNOW IS CLYDE'S. I DON'T KNOW WHAT THE OTHER NAME IS.

Q DO YOU SEE DOWN THERE AT THE BOTTOM WHEN YOU SAID I DON'T REMEMBER GOING TO CLYDE THOMPSON'S PLACE? ARE YOU TALKING ABOUT CLYDE'S? IS THAT WHAT THAT'S TALKING ABOUT? SEE RIGHT DOWN THERE AT THE BOTTOM.

A WELL, I DIDN'T SAY THAT TO BOOT SMITH. I SAID WHEN I LEFT TOWN I WENT TO THE RED CARPET.

Q OKAY. THAT'S WHAT YOU SAID A MINUTE AGO, RIGHT?

A YEAH.

Q OKAY. AND WHEN YOU TALKED TO THE ATTORNEY A MINUTE AGO YOU SAID YOU WENT TO CLYDE'S, DON'T KNOW HOW LONG YOU STAYED. THEN YOU WENT TO THE RED CARPET AND YOU DON'T KNOW HOW LONG YOU STAYED.

BASICALLY, THE SHACK, CLYDE'S, RED CARPET, HOME, THAT'S HOW IT WENT, RIGHT, FROM WHAT YOU SAID A MINUTE AGO, RIGHT?

A RIGHT.

Q OKAY. NOW, WHAT I'M LOOKING AT HERE AGAIN, NOW, APRIL 7, OF '90 WHEN YOU GAVE THIS STATEMENT TO MR. SMITH, RIGHT?

[137] A RIGHT.

Q IT SAID, IT TALKS ABOUT YOU COMING TO YORK AND YOU'D SEEN JIMMY WHITE AND WENT TO THE SHACK, SAW MICHAEL BURKIN AT THE RED CARPET. THEY CLOSED AT MIDNIGHT. IT SAYS, "I DRANK A FEW BEERS. I CAN'T REMEMBER MUCH ABOUT THAT WEEKEND." IS THAT TRUE?

A YEAH.

Q EXCUSE ME, SIR. I ASKED YOU TWO QUESTIONS. LET ME ASK YOU AGAIN, SIR. YOU TOLD US YOU DRANK A FEW BEERS AT DIFFERENT PLACES, RIGHT?

A YES. I DRUNK A BEER DOWN AT THE SHACK AND I DRUNK ONE OVER TO CLYDE'S.

Q OKAY. AND YOU TOLD HIM, YOU TOLD BOOT SMITH, "I CAN'T REMEMBER MUCH ABOUT THAT WEEKEND." IS THAT RIGHT? YOU SAID, "IT'S BEEN A LONG TIME."

A DID I SAY THAT?

Q YES SIR, IT'S RIGHT HERE.

A OKAY. THE MORNING THAT BOOT SMITH CALLED ME, THEY CALLED ME AND ASKED ME DID I KNOW JIMMY WHITE. I TOLD THEM YEAH. AND THEY SAID, DID JIMMY WHITE AT THE RED ROOF THAT DAY, THAT NIGHT. I TOLD THEM NO.

Q OKAY. AND SOMETIME LATER – AGAIN, I'M JUST LOOKING AT THIS. YOU SAY THAT'S YOUR SIGNATURE THERE. AND THE ONLY DATE I SEE ON IT – OF COURSE, I SEE THE DATE THAT THE CRIME

TOOK PLACE. BUT I SEE 4/7/90. OF COURSE, [138] THAT'S MR. SMITH'S SIGNATURE THERE, I ASSUME. DO YOU RECALL THIS SHEET?

A I WAS UP THERE THAT SAME TIME, THAT SAME MORNING THAT HE CALLED ME UP THERE.

Q WHEN YOU WERE UP THERE THEN DID YOU SIGN SOMETHING?

A YEAH.

Q AND I MEAN, ARE YOU THINKING THAT'S WHAT YOU SIGNED THAT DAY? YOU'VE GOT THE SHEET THERE, TOO. YOU LOOK AT IT. DO YOU THINK THAT'S WHAT YOU SIGNED THAT DAY WHEN YOU TALKED TO BOOT?

A YES SIR, I SIGNED IT WHEN I TALKED TO BOOT.

Q IS THAT THE STATEMENT THAT YOU GAVE THEN?

A YES SIR. THAT SATURDAY MORNING.

Q SO THAT'S WHAT THIS IS. WHEN IT SAYS 4/7/90 YOU'RE SAYING THAT'S WHAT YOU SIGNED THAT DAY FOR BOOT? THE DAY AFTER THE CRIME?

A THAT MORNING, WHEN HE CALLED ME AND TOLD ME TO COME TO THE POLICE STATION.

Q OKAY. AND IN THAT STATEMENT YOU SAID, I CAN'T REMEMBER MUCH ABOUT THAT WEEKEND. OF COURSE, YOU WOULDN'T HAVE SAID THAT ABOUT THAT WEEKEND, BECAUSE IT JUST HAPPENED THE NIGHT BEFORE, RIGHT?

IT HAPPENED THAT SAME NIGHT THAT THEY CALLED ME UP THERE.

Q "THIS STATEMENT IS TRUE AND CORRECT TO THE BEST OF [139] MY KNOWLEDGE." AND THAT'S YOUR SIGNATURE ON IT?

A THAT'S MY SIGNATURE.

Q MR. LYTLE, LET ME ASK YOU THIS, YOU KNOW WHAT THIS CASE IS ABOUT, YOU KNOW WHAT HAPPENED, RIGHT?

A RIGHT.

Q HAS ANYBODY TALKED TO YOU ABOUT THAT, ABOUT WHAT THIS CASE IS ABOUT?

A YEAH. ONE LAWYER COME AND TALKED TO ME ABOUT, I'D SAY ABOUT A COUPLE OF MONTHS AGO ABOUT BOBBY.

Q BOBBY HOLMES?

A BOBBY HOLMES.

Q LET ME ASK YOU THIS, THAT EVENING YOU DIDN'T SEE JIMMY WHITE GO IN MRS. STEWART'S HOUSE, DID YOU?

A NO.

Q BECAUSE ACCORDING TQ ONE PART OF YOUR TESTIMONY YOU DIDN'T SEE JIMMY WHITE AND THE OTHER ONE, YOU SAY YOU SAW HIM UP AT THE SHACK, RIGHT?

A YEAH. BUT I CAN'T REMEMBER.

Q BUT YOU SAY THAT'S YOUR SIGNATURE, RIGHT?

A I SEEN IT. THAT'S MY SIGNATURE.

Q LET ME ASK YOU THIS, BASICALLY AS FAR AS, YOU CAN ONLY TELL WHAT YOU DID. YOU LOADED UP. YOU WENT TO THE SHACK. YOU WENT TO THESE DIFFERENT PLACES AND YOU WENT HOME. IS THAT RIGHT?

A YEAH.

[140] Q AS FAR AS JIMMY WHITE GOING IN MRS. STEWART'S HOUSE OR WHETHER HE DID OR DIDN'T, OR WHETHER BOBBY HOLMES DID OR DIDN'T, YOU JUST REALLY DON'T KNOW, DO YOU, MR. LYTLE? I MEAN, ABOUT THAT, YOU DON'T KNOW ANYTHING ABOUT THAT, DO YOU?

A I DON'T KNOW ANYTHING ABOUT THAT.

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[Defense Witness Annie Boyd –
Direct Examir .tion By Mr. MacDougall]

[163] Q WHAT IS YOUR FULL NAME, MA'AM?

A MY NAME?

Q YES MA'AM.

A ANNIE BOYD.

Q HAVE YOU ALWAYS BEEN KNOWN BY THE NAME, ANNIE BOYD?

A NO SIR. I MARRIED A BOYD.

Q AND I APOLOGIZE FOR ASKING THIS QUESTION, BUT I HAVE TO. HOW OLD ARE YOU, MA'AM?

A EIGHTY-SEVEN.

Q I'M SORRY, EIGHTY-SEVEN?

A EIGHTY-SEVEN.

Q MRS. BOYD, WE'RE HERE ON A HEARING CONCERNING SOME [164] THINGS THAT HAPPENED ON DECEMBER 31, 1989. DO YOU REMEMBER THAT DAY, DECEMBER 31, 1989?

A I REMEMBER SOMEBODY KNOCKING ON MY DOOR.

ON THAT NIGHT, DECEMBER 31, 1989, DID ANYTHING UNUSUAL HAPPEN AT YOUR HOUSE?

A NO.

Q YOU MENTIONED A MOMENT AGO SOMEONE KNOCKING AT THE DOOR.

A I DIDN'T ASK WHO IT WAS. I DIDN'T SAY NOTHING.

Q I'M SORRY?

A I DIDN'T SAY ANYTHING, BUT HE JUST SAY HIS NAME WAS JIMMY. OPEN THE DOOR, MY NAME IS JIMMY. BUT I DON'T KNOW.

Q WOULD YOU REPEAT THAT, PLEASE, MRS. BOYD? WHAT DID THE VOICE SAY?

A AT THE DOOR?

Q YES MA'AM.

A HE JUST SAY HIS NAME JIMMY. HE KNOCKED ON THE DOOR AND HE SAY, OPEN THE DOOR, MY MAN. THIS IS JIMMY. I DIDN'T KNOW WHO IT WAS. I DIDN'T OPEN IT. I JUST HEAR HIM.

Q DID YOU RECOGNIZE THE VOICE?

A NO, I DIDN'T.

Q DID YOU OPEN THE DOOR?

A NO, I DIDN'T.

[165] Q HOW LONG DID THE KNOCKING GO ON?

A HE KNOCKED TWO OR THREE TIMES.

Q AND HOW MANY TIMES DID THE VOICE SAY OPEN THE DOOR, MY MAN, THIS IS JIMMY?

A HE JUST SAY OPEN THE DOOR. HE SAY, MY MAN, THIS IS JIMMY, OPEN THE DOOR.

Q DID HE SAY –

A AND I RECKON HE WANTED TO COME IN BUT HE DIDN'T GET IN.

Q DID HE SAY –

A WHOEVER IT WAS.

Q I'M SORRY. DID HE SAY IT MORE THAN ONCE?

A HE SAID IT TWICE.

Q AND WHAT TIME OF NIGHT WAS THIS?

A I COULDN'T TELL YOU. IT WAS ON INTO THE NIGHT.

Q WAS IT DARK OUT?

A OH, YES, IT WAS DARK. IT WAS REALLY LATE. IT WAS OVER IN THE NIGHT.

Q HAD THE SUN COME UP YET?

A NO, IT WAS DARK IN THE NIGHT.

Q WHERE WERE YOU? I'M SORRY. I APOLOGIZE FOR INTERRUPTING.

A I WAS HOME ON CALIFORNIA STREET.

Q DO YOU REMEMBER THE NUMBER OF YOUR HOME ON CALIFORNIA STREET?

[166] A THE TWENTY-FIRST, I THINK.

Q I'M SORRY?

A I DONE FORGOT THE NUMBER. THE FIRST HOUSE.

Q DID YOU KNOW MARY STEWART?

A YES. I HAD MET HER AFTER THE TIME WE MOVED THERE.

Q AT THE TIME THAT THIS HAPPENED, THE KNOCKING ON THE DOOR THAT CAME WITH THE VOICE, WHERE WAS MARY STEWART LIVING?

A SHE LIVED ON THE OTHER SIDE OF ME, I THINK. I DON'T KNOW IF IT WAS AN APARTMENT OR NOT.

Q NOW, IS IT CORRECT AT THE APARTMENTS ON CALIFORNIA STREET THERE WERE TWO APARTMENTS ON EITHER SIDE OF A WALL THAT RUNS BETWEEN THEM?

A WELL, SEE, ON HER SIDE, SHE GO RIGHT PAST MY APARTMENT TO GO TO HERS.

Q SHE WAS RIGHT PAST YOUR APARTMENT?

A YES, ON THE SAME SIDE AS ME.

Q DID YOU HEAR ANYTHING ELSE THAT NIGHT?

A I DIDN'T HEAR NOTHING AFTER HE LEFT MY HOUSE.

Q AND THE NEXT MORNING, BETWEEN THE TIME YOU HEARD THE VOICE AND THE NEXT MORNING DID YOU SEE ANYTHING ELSE?

A I DIDN'T SEE NOTHING. I DIDN'T SEE. THAT MORNING WHEN I GOT UP THE POLICE WAS OUT THERE AND ASKED ME HAD I HEARD ANYTHING. AND I TOLD THEM SOMEBODY KNOCKED ON THE DOOR BUT I DIDN'T OPEN THE DOOR.

[167] Q DID THE POLICE TALK TO YOU THE NEXT MORNING?

A YES, HE TALKED OUT THERE.

Q DID YOU KNOW THE POLICEMAN?

A YES.

Q AND WHAT DID HE ASK?

A HE JUST ASKED ME DID I HEAR ANYTHING. HE JUST ASKED ME.

Q AND WHAT DID YOU TELL HIM?

A I TOLD HIM – NO SIR, I DIDN'T HEAR NOTHING AFTER HE LEFT MY HOUSE, MY APARTMENT.

Q YOU TOLD HIM AFTER HE LEFT YOUR HOUSE?

A NO, I DIDN'T HEAR ANYTHING.

Q DID YOU TELL HIM ABOUT WHAT YOU HEARD THE NIGHT BEFORE?

A THAT NIGHT BEFORE?

Q YOU TESTIFIED TO THE KNOCKING AND TO THE VOICE THAT SAID, LET ME IN MY MAN, THIS IS JIMMY.

A THAT WAS THE SAME NIGHT.

Q DID YOU TELL THE POLICEMAN ABOUT THAT?

A YES, I TOLD.

Q DID HE ASK ANY QUESTIONS ABOUT THAT?

A HE DIDN'T ASK NO QUESTION. HE ASKED ME DID I OPEN THE DOOR TO MY HOUSE. I TOLD HIM NO. HE DIDN'T ASK ANY OTHER QUESTIONS.

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[Annie Boyd – Cross Examination By Mr. Pope]

[169] Q HE WAS JUST KNOCKING ON THE DOOR AND SAYING, OPEN THE DOOR, MY MAN, THIS IS JIMMY?

A I DON'T KNOW WHO IT WAS.

Q YOU DON'T KNOW WHO IT WAS?

A I NEVER HEARD. I DIDN'T LOOK.

Q YOU DIDN'T LOOK. DID YOU TELL THEM THAT YOU WERE GOING TO CALL THE POLICE?

A NO, I DIDN'T.

Q YOU DIDN'T TALK TO THEM?

A NO.

Q WHAT TIME DO YOU NORMALLY GO TO BED, MRS. BOYD?

A TEN AND ELEVEN O'CLOCK. SOME PEOPLE BE STAYING NEXT TO ME, MS. SHANNON, WE BE SITTING THERE ON THE PORCH AND TALKING IN THE EVENING.

Q IN THE EVENING Y'ALL SIT OUT ON THE PORCH AND TALK?

A YEAH, AND THEN AT NIGHT WE SET THERE. AND THEN THEY COME BACK HOME.

Q WOULD YOU SIT OUT THERE WHEN IT WAS COLD IN THE WINTER TIME?

A NO SIR.

Q DO YOU KNOW HOW IN THE WINTER IT STARTS GETTING DARK EARLY AND A LOT OF PEOPLE GO TO BED A LOT EARLIER? WHAT TIME DO YOU THINK NORMALLY AROUND THE WINTER TIME, AROUND [170] CHRISTMAS TIME, AROUND THAT TIME DID YOU GO TO BED?

A I DON'T KNOW. WHENEVER I GET SLEEPY.

Q IS IT NORMALLY RIGHT AROUND DARK TIME OR IS IT A LOT LATER THAN THAT? DO YOU STAY UP ALL NIGHT HOURS?

A NO.

Q MA'AM, YOU'LL HAVE TO ANSWER WHERE THE JUDGE CAN HEAR YOU.

A NO.

Q SO, YOU JUST KIND OF GO TO BED WHEN YOU GET SLEEPY AND WAKE UP WHEN YOU GET THROUGH SLEEPING?

A YES.

Q OKAY. SO, THIS PARTICULAR NIGHT, SOMETIME IN THE NIGHT HOURS, DO YOU THINK – AND AGAIN, I DON'T WANT TO PUT WORDS IN YOUR MOUTH. DO YOU THINK YOU WENT TO BED AT TEN O'CLOCK THAT NIGHT BEFORE?

A I DON'T KNOW.

Q YOU DON'T KNOW. SO, YOU GO TO BED AND SOMETIME DURING THE DARK, NIGHTTIME YOU REALLY DON'T KNOW WHAT TIME, THERE WAS A KNOCKING AT THE DOOR. IS THAT RIGHT?

A NO. BECAUSE I DIDN'T KNOW BECAUSE I WAS BACK IN THE ROOM IN THE BED

Q IS IT A ONE-BEDROOM APARTMENT?

A IT'S TWO BEDROOMS. A LIVING ROOM AND THE BEDROOM, TWO ROOMS, LIVING ROOM.

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[Defense Witness Nancy Bennett –
Direct Examination By Mr. MacDougall]

[177] Q DID THERE EVER COME A TIME WHEN YOU HAD CONVERSATIONS WITH MR. WHITE AT YOUR RECEPTIONIST'S DESK?

A YES.

Q COULD YOU TELL US GENERALLY WHAT THE TOPIC OF THE DISCUSSION WAS?

A BASICALLY HE, I MADE HIM AN APPOINTMENT WITH THE ATTORNEY, AS WELL AS I CAN REMEMBER. HE BROUGHT UP IN THE CONVERSATION THE BOBBY HOLMES CASE. AND I BELIEVE THAT HE WAS ASKING, YOU KNOW, WHEN IT WAS GOING TO COME UP, OR SOMETHING TO THAT EFFECT.

Q WAS THERE ANYONE ELSE PRESENT WHEN YOU HAD THIS CONVERSATION?

A NO.

Q WHERE DID IT TAKE PLACE?

A IN MY OFFICE AT THE PUBLIC DEFENDER'S OFFICE.

Q HOW MANY TIMES DID YOU HAVE THIS CONVERSATION WITH HIM?

A JUST ONCE.

Q AND I BELIEVE YOU TESTIFIED HE ASKED YOU WHEN THE BOBBY HOLMES CASE WAS COMING UP?

A I THINK THAT'S RIGHT.

Q DID YOU RESPOND TO HIM?

A I PROBABLY TOLD HIM THAT AT THAT POINT I DIDN'T KNOW, YOU KNOW, JUST GENERAL CONVERSATION.

[178] Q WHAT DID HE SAY, FURTHER, IF ANYTHING, REGARDING THE BOBBY HOLMES CASE?

A I REALLY CAN'T REMEMBER EVERYTHING THAT HE SAID. HE MADE THE COMMENT THAT HE DIDN'T THINK THAT BOBBY WAS GUILTY AND THAT HE KNEW MAYBE WHO DID IT. AND THAT EVERYBODY ON THE STREET KNEW. IT WAS JUST BASICALLY THAT TYPE.

Q DID HE TELL YOU WHO HE THOUGHT DID IT?

A NO.

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[Defense Witness Stephen Westbrook –
Direct Examination By Mr. MacDougall]

[183] Q I'D LIKE TO GO BACK TO APRIL – WELL, LET ME ASK YOU A PRELIMINARY QUESTION. BEFORE APRIL OF '92 WERE YOU EVER INCARCERATED AT THE BROAD RIVER FACILITY?

A YES SIR.

Q DO YOU RECALL WHEN YOU WERE THERE?

A DECEMBER '89 TO '90, SEPTEMBER, '90.

Q AND DURING THAT PERIOD OF TIME WHILE YOU WERE AT BROAD RIVER WHICH DORM WERE YOU HOUSED IN?

A MARION.

Q DID YOU DURING THAT PERIOD COME INTO CONTACT WITH [184] AN INDIVIDUAL BY THE NAME OF JIMMY WHITE?

A YES SIR. WE SLEPT IN THE SAME UNIT.

Q I'M SORRY?

A WE SLEPT IN THE SAME UNIT.

Q AND HAD YOU KNOWN MR. WHITE BEFORE HE ARRIVED AT MARION DORM?

A NAH.

Q AND HAD DO RECALL WHAT MR. WHITE WAS INCARCERATED FOR AT THE TIME?

A NAH, I DON'T KNOW WHAT HE WAS INCARCERATED FOR AT THE TIME WHEN HE CAME TO MARION. I DON'T KNOW.

Q DID YOU GET TO KNOW MR. WHITE WHILE HE WAS AT BROAD RIVER?

A YEAH, HE FROM UP MY WAY.

Q DID YOU – WELL, LET ME TALK ABOUT THAT FOR A MINUTE. WHEN YOU SAY FROM UP YOUR WAY, WHERE'S YOUR HOME?

A WE FROM YORK COUNTY. WE RAN TOGETHER, YOU KNOW, IN THE PENITENTIARY.

Q SO, YOU DIDN'T. KNOW HIM. BEFORE YOU MET HIM AT MARION DORM, BUT AFTERWARDS, BECAUSE YOU WERE FROM THE SAME COUNTY AND THE SAME AREA YOU BECAME FRIENDS?

A YEAH.

Q DID THERE COME A TIME WHEN MR. WHITE DISCUSSED WITH YOU THE ASSAULT AND SUBSEQUENT DEATH OF MARY STEWART?

[185] A YES SIR.

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[186] Q AND DID YOU HAVE A DISCUSSION WITH HIM?

A YEAH. I HAD A DISCUSSION WITH HIM.

Q WAS ANYONE ELSE THERE?

A WELL, IT WAS ME AND HIM IN THE ROOM AND THEN JIMMY. THE OTHER INMATE NAMED

JIMMY. WE WAS ROOMMATES AT THE TIME. WHITE – JIMMY LEFT OUT AND THEN ME AND WHITE GOT TO DISCUSS.

Q HOW DID THE MARY STEWART CASE COME UP?

A BECAUSE A FEW INMATES ON THE YARD, WHATEVER, WAS SAYING THAT JIMMY WHITE KNEW MORE ABOUT THE CASE OF MRS. STEWART. AND SO I ASKED HIM WHAT DID HE KNOW ABOUT THE CASE.

Q AND WHAT DID HE TELL YOU?

A WELL, HE TOLD ME HE HAD BROKE INTO SOME OLD LADY HOUSE NAMED – WELL, I DON'T KNOW HER NAME, HER FIRST NAME. HE JUST SAID MRS. STEWART, HE BROKE INTO HER HOUSE AND RAPED HER.

Q DID HE SAY HE HAD DONE ANYTHING ELSE IN MRS. STEWART'S HOUSE?

A HE JUST SAY HE BROKE INTO HER HOUSE.

[187] Q NOW, DID YOU –

A AND RAPED –

Q I'M SORRY.

A AND RAPED HER.

Q NOW, AT THE TIME DID YOU KNOW THE DEFENDANT IN THIS CASE, BOBBY LEE HOLMES?

A I AIN'T KNOW HIM. DID I KNEW HIM?

Q YES, DID YOU KNOW HIM AT THE TIME?

A NAH, NOT PRIOR TO COMMITTING NO CHARGE, NAH. I JUST KNEW WHITE.

Q SO, AT THE TIME THIS CONVERSATION WITH WHITE TOOK PLACE IN 1990, YOU DIDN'T YET KNOW BOBBY LEE HOLMES?

A OH, YEAH, I KNOWED OF HIM. YEAH, I KNOWED OF HIM.

Q HAD YOU MET HIM?

A YEAH.

Q DID YOU KNOW HE HAD BEEN CHARGED WITH A CRIME?

A NO, I AIN'T KNOW THAT.

Q IN THIS CONVERSATION, DID MR. WHITE MENTION, DID JIMMY WHITE MENTION BOBBY LEE HOLMES IN CONNECTION WITH THE ATTACK ON MARY STEWART?

A YEAH, HE MENTIONED IT.

Q WHAT DID HE SAY?

A HE SAY BOBBY DIDN'T COMMIT THE CRIME, HE DID.

Q DID HE SAY WHETHER HE WAS, WHAT HIS CONCERNS WERE? WAS HE WORRIED ABOUT BEING CHARGED HIMSELF?

[188] A YEAH. HE SAID MR. SMITH TOLD HIM TO KEEP QUIET ABOUT THE CASE, HE WANTED TO GET BOBBY HOLMES FOR THE CASE, SOMETHING THAT BOBBY HAD DONE TO HIM. HE WANTED

BOBBY HOLMES HELD ACCOUNTABLE FOR THE CHARGE.

Q WHO IS MR. SMITH?

A HIS NAME BOOT SMITH. I DON'T KNOW. HE SOMEWHERE UP IN HERE, I GUESS.

Q WAS HE A POLICE OFFICER?

A YEAH, YEAH. HE WAS A POLICE OFFICER.

Q MOVING FORWARD IN TIME FROM 1990 YOU MENTIONED THAT YOU HAD BEEN INCARCERATED SINCE 1992?

A SURE HAVE.

Q WHERE WERE YOU HELD IN 1994?

A 1994?

Q YES SIR.

A I WAS AT ALLENDALE.

Q WAS THERE ANY TIME IN 1994 THAT YOU RESIDED AT THE ROCK HILL JAIL?

A '94?

Q YES SIR.

A NAH. I WAS AT THE YORK COUNTY – IN '94 I RESIDED AT YORK COUNTY DETENTION CENTER IN '94, JUNE ON POST CONVICTION.

Q OKAY. DID YOU COME INTO CONTACT WITH JIMMY WHITE WHILE YOU WERE THERE?

[189] A YEAH, HE WAS NEXT DOOR TO ME.

Q AND WHEN YOU SAY NEXT DOOR YOU WERE IN ADJACENT CELLS?

A YEAH, IN THE BACK OF C BLOCK.

Q DID YOU HAVE ANY DISCUSSIONS WITH JIMMY WHITE AT THAT TIME REGARDING MARY STEWART?

A YEAH. I ASKED HIM, I SAY, YO, JIMMY, MY MAN, YOU KNOW THEY FOUND BOBBY GUILTY FOR THAT CHARGE. HE SAY, MAN, I KNOW. MR. SMITH TOLD ME TO KEEP QUIET ABOUT IT. I WAS GONNA COME TO COURT TO TESTIFY THAT I DID THE CRIME, BUT MR. SMITH TOLD ME TO KEEP QUIET ABOUT IT OR I'D BE ON DEATH ROW.

Q OKAY. SUBSEQUENTLY, BEFORE BOBBY LEE'S TRIAL, WERE YOU EVER HOUSED AT KIRKLAND CORRECTIONAL INSTITUTE?

A YES SIR.

Q YOU'VE MENTIONED MR. SMITH. DID HE EVER COME TO SEE YOU WHILE YOU WERE THERE?

A YES SIR.

Q WAS THERE ANYONE WITH HIM?

A YEAH, MS. POTTS.

Q WAS THAT B. J. POTTS?

A YES SIR.

Q WHERE WERE YOU PHYSICALLY IN THE FACILITY WHEN THEY CAME TO SEE YOU?

A I WAS IN POPULATION, BUT I WAS GONNA SEE THEM UP [190] IN OPERATION.

Q THEY CALLED YOU UP TO OPERATIONS TO SEE THEM?

A YES SIR.

Q AND WHEN YOU MET WITH BOOT SMITH AND B. J. POTTS WHAT DID THEY SAY?

A WELL, THEY ASKED ME – THEY WAS READING SOME INFORMATION OUT. AND MS. POTTS AND MR. SMITH ASKED ME. DID I WANT TO GET OUT OF JAIL. RIGHT. I SAY, IT DEPEND ON WHAT I HAVE TO DO. AND SHE SAY, WELL, THE ONLY THING YOU GOT TO DO IS COME TO COURT AND ADMIT THAT YOU, ADMIT, TELL THE JUDGE AND THE JURY THAT BOBBY HOLMES TOLD YOU HE COMMITTED THOSE CRIMES, THAT HE BROKE INTO THAT LADY'S HOUSE AND RAPED HER.

Q WAS ANYONE ELSE PRESENT WHEN YOU HAD THIS CONVERSATION BESIDES YOURSELF, B. J. POTTS AND BOOT SMITH?

A NO SIR. GERALD SMITH CAME DOWN ABOUT FIVE MINUTES AFTER THEY LEFT. HE WAS THERE, BUT HE WASN'T IN THE SAME ROOM WITH US. HE CAME IN AFTER THEY WALKED OUT.

Q OTHER THAN THE TWO CONVERSATIONS YOU'VE TESTIFIED TO WITH JIMMY WHITE IN 1990 AND 1994, DID YOU HAVE ANY OTHER DISCUSSIONS WITH HIM ABOUT THE MARY STEWART KILLING?

A NO SIR.

Q MOVING FORWARD IN TIME, MR. WESTBROOK, TO JUNE 23 OF THIS YEAR. WHERE WERE YOU RESIDING ON JUNE 23?

[191] A I WAS AT KIRKLAND SUPER MAX.

Q OKAY. AND DID ANYTHING HAPPEN THAT DAY?

A YES SIR.

Q WHAT HAPPENED THAT DAY?

A WELL, I WAS – THEY TOLD ME TO PACK UP, I NEEDED – I WAS GOING TO COURT, MY LAWYER NEED TO SEE ME. AND I WAS, LIKE, WHO WANT TO SEE ME. THEY SAY, WELL, YOUR LAWYER. THE MAN, GALLARDO, THE MAN GALLARDO AND PULLIAM TWO LIEUTENANTS WAS SAYING YOUR LAWYER COMING. I SAY, WHO. HE SAY, WELL, MR. PETE SKIDMORE NEED TO SEE YOU. I WAS, LIKE, ALL RIGHT.

THEN WHEN I GOT UP TO ROCK HILL THEY TOLD ME MR. THOMPSON WAS MY ATTORNEY AND CHUCK NEAL AND MR. POPE NEEDED TO SEE ME.

Q OKAY. YOU'VE GOT A LOT OF NAMES IN THERE. LET ME GO THROUGH THAT QUICKLY. PULLIAM AND GALLARDO ARE CORRECTION OFFICERS –

A YEAH.

Q LIEUTENANTS AT KIRKLAND?

A YEAH, OVER THE SUPER MAX UNIT WHERE I WAS AT, WHERE I WAS STAYING AT.

Q AND THEY CAME TO SEE YOU?

A YEAH. NO, THEY WAS IN THE UNIT.

Q IN THE UNIT.

A THEY THE ONE TOLD ME THAT MORNING THAT I WAS COMING [192] TO SEE PETE SKIDMORE.

Q AND PETE SKIDMORE IS THE INVESTIGATOR WORKING ON THE HOLMES CASE AND HE'S SITTING RIGHT OVER THERE. IS THAT RIGHT?

A YEAH, THAT'S THE MAN THEY SAID I WAS COMING TO SEE.

Q OKAY. WHAT OTHER – THEY SAID YOU WERE COMING TO SEE HIM. DID YOU THEN GET DRIVEN TO YORK COUNTY FROM KIRKLAND?

A YES SIR.

Q OKAY.

A BY GALLARDO AND PULLIAM.

Q OKAY. WHEN YOU ARRIVED HERE IN YORK, WHAT HAPPENED?

A THEY CARRIED ME DOWN THE HALLWAY TO THE SOLICITOR'S OFFICE WHERE MR. THOMPSON, CHUCK NEAL AND MR. POPE WAS, AND PULLIAM AND GALLARDO WAS THERE.

Q SO, THE FIVE OF THEM WERE IN THE CONFERENCE ROOM WITH YOU?

A YEAH. POPE CAME IN LAST.

Q WHAT HAPPENED NEXT?

A WELL, CHUCK NEAL TOLD ME – HE WAS, LIKE, – HE OPENED UP HIS FILE. HE HAD TWO LETTERS. HE SAYING ONE OF THE LETTERS WITH MY NAME ON IT, THAT SAY I BEEN KNOWING ABOUT THE HOLMES FOR TEN YEARS. AND YOU CAN CUT ME A DEAL, I CAN WORK WITH YOU. AND THEN ONE GOES ON TO SAY THAT ANOTHER, THAT BOBBY HOLMES SAID, WELL, YOU KNOW, [193] THAT'S HOW YOU DO. IT, MOTHER-FUCKER. YOU DON'T LEAVE NOBODY – EXCUSE ME, YOUR HONOR.

YOU DON'T LEAVE NOBODY STANDING WHEN YOU COMMIT A CRIME. YOU GO ON AND KILL THEM AND MAKE SURE THEY CAN'T BE A WITNESS.

Q AND THESE WERE LETTERS THAT WERE SHOWN TO YOU?

A YEAH, BY THOMPSON AND CHUCK NEAL.

Q WERE ALL FIVE PRESENT AT THE TIME?

A POPE CAME IN.

Q HAD YOU SEEN THESE LETTERS BEFORE THAT DAY?

A NO. THEY WAS SAYING THEY WAS GONNA – THEY WAS SAYING THEY WAS GONNA BRING – THEY WAS SAYING THEY WAS GONNA PRESENT THEM TO THE JUDGE AND MAKE THE JUDGE MAKE IT LOOK LIKE I WROTE THEM 'CAUSE MY NAME ON ONE OF THEM AND MAKE ME LOOK LIKE A RAT.

Q OKAY.

A AND TOLD ME BRING ME ALL THE WAY UP HERE TO MAKE LOOK LIKE A RAT THAT'S MESSED UP.

Q OKAY. WAS YOUR SIGNATURE ON ANY ONE OF THOSE LETTERS?

A NO. MY SIGNATURE AIN'T ON THEM. MY NAME ON THEM AND MY NUMBER. HE WAS SAYING HE COULD GET EXPERT WITNESS TO SAY THAT THOSE LETTERS ARE MINE.

Q BUT DID YOU WRITE EITHER ONE OF THOSE LETTERS?

A NO SIR, I DID NOT.

[194] Q YOU DIDN'T?

A I TOLD HIM THE SAME THING.

Q HAD YOU EVER SEEN EITHER OF THOSE LETTERS BEFORE THAT DAY?

A NO SIR. THEY SHOWED THEM TO ME.

Q WHAT ELSE WAS DISCUSSED THAT DAY, JUNE 23, HERE IN YORK?

A WELL, MR. CHUCK NEAL OVER THERE, HE WAS, LIKE, YOU KNOW GODDAM BOBBY – SORRY, YOUR HONOR.

THE COURT: I'VE HEARD IT BEFORE.

A YOU KNOW GODDAM BOBBY HOLMES SIXTEEN YEARS. HE GOT THIS WATCHDOG ATTORNEY FROM D. C. AND HE GOT MR. SKIDMORE, WHO'S A

HOMOSEXUAL, REPRESENTING HIM. I WAS, LIKE, YO, I AIN'T KNOW THAT.

AND HE SAY, YOU KNOW, DAMN GOOD AND WELL BOBBY HOLMES BROKE INTO EIGHTY-TWO YEAR OLD MRS. STEWART'S HOUSE AND I WANT YOU TO GET UP THERE AND TELL THE JURY THAT BOBBY – I WANT YOU TO GET UP THERE AND TELL THE JURY AND THE JUDGE THAT BOBBY HOLMES TOLD YOU HE BROKE INTO MRS. STEWART'S HOUSE, EIGHTY-TWO YEARS OLD, STOLE, TOOK $40.00 FROM HER AND SODOMIZED HER REPEATEDLY.

Q AND WHAT WAS YOUR RESPONSE TO THAT?

A I WAS, LIKE, YO, MAN, THIS TRIAL, THIS CASE DON'T BENEFIT ME. HE WAS, LIKE, OH. AND HE WAS, LIKE, YOU WANT TO DEAL? AND I WAS, LIKE, NO, I DON'T NO DEAL. [195] HE WAS, LIKE, YOU KNOW, WE AIN'T THE FEDS. WE CAN'T HELP YOU GET OUT. YOU KNOW THAT. YOU AIN'T GOT NO MORE MORALS. YOU DON'T LOST ALL YOUR MORALS, MR. WESTBROOK. YOU GONNA LET A RAPIST WALK THE STREET. AND THEN HE GO OUT THERE AND SOMETHING TO YOUR PEOPLES. COME ON, MAN. YOU DONE LOST ALL YOUR MORALS, YOU NEED TO STAY IN JAIL.

I WAS, LIKE, YOU KNOW, THAT'S WHERE I BE AT, IN JAIL, THEN I'LL STAY IN JAIL.

Q AND WHO WAS IT THAT WAS TALKING TO YOU ABOUT YOUR MORALS?

A MR. NEAL, THE ONE SETTING RIGHT THERE.

Q OKAY. HE'S IN THE COURTROOM HERE TODAY?

A YES SIR.

Q WHAT ELSE WAS DISCUSSED?

A HE WAS, LIKE, WELL, BOBBY HOLMES. THEY GOT SOME UNDERWEAR FROM SOMEONE AND WHEN THEY TOOK THEM FROM THE COUNTY JAIL AT THE DETENTION CENTER THEY DIDN'T BELONG TO BOBBY HOLMES OR HIS PALM PRINT. BUT WE CAN LINK HIM TO IT BECAUSE WE GOT UNDERWEAR FROM SOMEONE ELSE AND WE CAN SAY THAT THEY BOBBY HOLMES IN COURT. AND THE ONLY THING THAT YOU NEED TO DO IS COME IN THE COURTROOM AND SAY THAT BOBBY HOLMES TOLD YOU HE TOOK $40.00 FROM MRS. STEWART AND SODOMIZED HER REPEATEDLY.

Q NOW, HAD YOU HEARD ANY OF THIS BEFORE JUNE 23, THESE [196] FACTS?

A NO, THAT'S WHAT THEY TOLD ME TO SAY.

Q WHAT ELSE WAS DISCUSSED THAT DAY, IF ANYTHING?

A WELL, I DON'T KNOW. POPE CAME IN AND HE WAS, LIKE, YO, YOU NEED TO SEE ME. I WAS, LIKE, MAN, I DON'T NEED TO SEE Y'ALL. I DON'T KNOW YOU. I AIN'T COME TO THIS TRIAL IN THE FIRST TRIAL. THEY SNATCHED ME UP BY THE CHAIN, GET HIM ON OUT OF HERE. I WALKED ON OUT.

Q AND WHAT HAPPENED NEXT?

A WELL, THAT'S JUST ABOUT IT.

Q WELL, WHERE DID YOU GO FROM THERE?

A WELL, I WENT BACK TO KIRKLAND SUPER MAX. AND WELL, AT FIRST, WHEN THOSE TWO, CHUCK NEAL AND THE OTHER CAT RIGHT THERE WALKED OUT, HE WAS, LIKE, PULLIAM AND GALLARDO. SAID NOW, THEY WAS, LIKE, WELL, MR. WESTBROOK, YOU NEED TO GO ON AND COOPERATE WITH THEM. BECAUSE YOU KNOW THEY WORK IN THE UNIT WITH YOU. THEY BEEN LISTENING IN ON YOUR CONVERSATIONS. WHY DO YOU THINK WE THE TWO BROUGHT YOU UP HERE.

AND PETE CAME TO SEE ME. AND HE SAID, WELL, WHAT PETE TELL YOU. I SAID, PETE JUST TOLD ME HE WAS THE PUBLIC DEFENSE. I SAID, THAT'S ALL HE TOLD ME. I SAY, I TALKED TO HIM FOR ABOUT FIVE MINUTES.

BUT THAT'S ALL HE ASKED ME. HE SAID HE WOULD GET BACK WITH ME. AND HE SAY, DID PETE GET BACK WITH YOU? [197] SAY, NAH, HE NEVER CAME BACK. HE SAY, YOU'LL SEE ME LATER ON.

Q OKAY. AFTER YOU RETURNED TO KIRKLAND ON JUNE 23, HOW MUCH LONGER WERE YOU THERE IN SUPER MAX?

A THREE DAYS.

Q WHERE DID YOU GO FROM THERE?

A LEE COUNTY. I JUST GOT TO LEE COUNTY.

Q WHAT'S THE DIFFERENCE BETWEEN LEE COUNTY AND KIRKLAND SUPER MAX?

A WELL, KIRKLAND SUPER MAX IS BASICALLY HOUSING FOR THE MOST DANGEROUS INMATE, YOU KNOW WHAT I'M TALKING ABOUT, IN THE DEPARTMENT OF CORRECTIONS.

Q ARE CONDITIONS DIFFERENT IN LEE?

A YEAH.

Q HOW ARE THEY DIFFERENT?

A WELL, YOU GOT TVs AND RADIOS IN THE CELL AT MAX, SHOWERS IN THE CELLS. AND AT LEE YOU DON'T GOT THOSE THINGS. YOU JUST GET READING MATERIAL.

Q DO YOU HAVE MORE FREEDOM AT LEE TO MOVE AROUND?

A YEAH. BASICALLY THE SAME, YOU KNOW. BASICALLY, THE SAME.

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[Stephen Westbrook – Cross Examination By Mr. Pope]

[203] Q HOW DID YOU GET TO KNOW BOBBY DOWN IN ROCK HILL?

A I KNEW HIM, I KNOWED HIM FROM AROUND.

Q I MEAN, BACK WHEN YOU WERE OUT, BACK WHEN HE WAS OUT?

A HE WASN'T OUT WHEN I WAS OUT. I WAS LOCKED UP.

Q OKAY.

A I WAS LOCKED UP.

Q DID YOU KNOW HIM WHEN YOU WERE LITTLE? DID YOU GROW UP IN ROCK HILL?

A YES SIR.

Q I MEAN, THAT'S WHAT I JUST TRYING TO GET, A FEEL. IT'S NOT A TRICK QUESTION. I'M JUST TRYING TO GET A FEEL OF HOW YOU KNEW HIM. JUST TELL JUDGE HAYES HOW YOU KNEW [204] HIM OR WHEN YOU KNEW HIM.

A I KNOW HIM. I KNOW HIM FROM – I KNOWED HIM. BOBBY ALWAYS BEEN IN YORK, THOUGH. I KNOWED HIM FROM BEING IN ROCK HILL, HE ALWAYS LIVED UP IN THIS AREA SOMEWHERE.

Q WAS IT THAT HIS MAMA LIVED DOWN IN ROCK HILL AND HIS DADDY LIVED UP HERE IN YORK. IS THAT RIGHT?

A I DON'T KNOW NOTHING ABOUT HIS FAMILY LIKE THAT.

Q OKAY.

A I DON'T KNOW HIS DAD AND LIKE THAT.

Q AGAIN, JUST TELL – WHAT I'M TRYING TO GET AT – I'M NOT TRYING TO MAKE IT HARD. JUST TELL THE JUDGE HOW IT WAS THAT YOU KNEW HIM. HOW OLD WERE YOU WHEN YOU KNEW HIM? I MEAN, DID Y'ALL RUN AROUND AND PLAY ON THE PLAYGROUND TOGETHER OR DID YOU SEE HIM OUT AT CLUBS? OR HOW DID YOU KNOW HIM? THAT'S WHAT I'M TRYING TO FIND OUT.

A WHERE YOU WANT TO KNOW – I MET BOBBY, LIKE, – I BEEN KNOWING HIM. I MET HIM AT THE COUNTY.

Q ARE YOU TALKING ABOUT DOWN ON CHERRY ROAD?

A YEAH.

Q WHEN YOU WERE IN AND HE WAS IN?

A YEAH.

Q SO YOU MET HIM THAT WAY?

A YEAH.

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[211] Q AND HE SAID, HE TOLD YOU, I BROKE INTO HER HOUSE AND RAPED HER. IS THAT RIGHT?

A YES SIR.

Q OKAY. LET ME DOUBLE CHECK. OTHER THAN THAT, LIKE YOU SAID, HE SAID BOBBY DIDN'T COMMIT THE CRIME, HE DID?

A YEAH.

Q AND THEN HE SAID THE THING ABOUT BOOT – WHEN YOU SAID MR. SMITH THAT TIME YOU WERE TALKING ABOUT BOOT SMITH, THE POLICE OFFICER, RIGHT?

A YES SIR.

Q BOOT SMITH TOLD HIM TO KEEP QUIET BECAUSE HE, BOOT SMITH, HAD SOMETHING – WAS IT JIMMY McCAW HAD SOMETHING AGAINST BOBBY

HOLMES OR BOOT SMITH HAD SOMETHING AGAINST BOBBY HOLMES?

A I DON'T KNOW. REALLY, I DON'T EVEN KNOW MR. SMITH.

Q YOU'RE TALKING ABOUT THE POLICE OFFICER?

A YEAH, UNTIL HE CAME TO SEE ME. I REALLY DON'T EVEN KNOW HIM LIKE THAT.

Q SO, YOU DON'T –

[212] A AND THEN JIMMY MENTIONED HIS NAME. OTHER THAN THAT, I DIDN'T KNOW HIM PREVIOUSLY.

Q I GOTCHA.

A BEFORE THAT, I DIDN'T KNOW HIM, BEFORE NONE OF THAT.

Q SO, WHAT I GUESS I'M ASKING, JIMMY WAS SAYING THAT BOOT SMITH HAD TOLD HIM TO KEEP QUIET?

A YEAH, ABOUT THE CASE.

Q OKAY. AND DID I UNDERSTAND YOU TO SAY THAT THERE WAS SOME REASON THAT BOOT SMITH WANTED TO FRAME BOBBY HOLMES?

A WELL, I DON'T KNOW. THAT'S WHAT JIMMY SAID.

Q OKAY, OKAY. YEAH, THAT'S WHAT I'M TRYING TO UNDERSTAND ABOUT IT.

A THAT'S WHAT JIMMY WHITE SAID.

Q OKAY. TOLD HIM TO KEEP QUIET, OKAY. THEN AT THE '94 YOU WERE DOWN AT THE DETENTION CENTER. IS THAT WHEN IT WAS OVER HERE THEN? WAS THAT HERE AT THE MOSS JUSTICE CENTER OR WAS IT STILL DOWN ON CHERRY ROAD?

A WE WAS ON CHERRY ROAD AT THE OLD DETENTION CENTER.

Q AND YOU ASKED HIM ABOUT IT THEN, YOU SAID ABOUT JUNE OF '94?

A YEAH. I'M SURE IT WAS JUNE BECAUSE I WAS UP THERE ON POST CONVICTION.

Q WHEN YOU HAD YOUR PCR HEARING?

A YEAH.

[213] Q AND –

A JIMMY WAS BACK FOR A PAROLE VIOLATION OR SOMETHING. I DON'T – I THINK IT WAS A PAROLE VIOLATION, PROBATION VIOLATION.

Q OKAY. AND HE SAID THEN THAT HE WAS GOING TO COME TO COURT AND ADMIT WHAT HE DID?

A YEAH. BOOT SMITH AND YOU TOLD HIM TO KEEP QUIET, OR HE GONNA GET CHARGED AND PUT ON DEATH ROW.

Q OKAY. SO, IN '94, BOOT SMITH TOLD HIM TO KEEP QUIET AND –

A YEAH, AND YOU.

Q – NOW HE'S SAYING I TOLD HIM TO KEEP QUIET?

A YOU AND SMITH, YEAH. YOU AND SMITH.

Q OKAY.

THE COURT: IF YOU CAN'T CONTROL YOURSELVES, YOU'LL HAVE TO LEAVE OR ELSE I'M GOING TO HAVE TO PUT YOU IN JAIL.

GO AHEAD.

Q SO, I TOLD HIM THAT BOOT SMITH TOLD HIM TO KEEP QUIET OR – WHAT DID I TELL HIM?

A HE GONNA GET – YOU GONNA CHARGE HIM WITH THE DEATH PENALTY.

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[238] Q AND BOBBY AND YOU GREW UP TOGETHER?

A WE DIDN'T GROW UP TOGETHER.

Q SO, THIS ISN'T TRUE, EITHER?

A I KNOW HIM.

Q I'M JUST ASKING YOU WHAT – YOU SIGNED THIS. IT SAYS BOBBY GREW UP TOGETHER. AND THAT AIN'T TRUE?

A I KNOW HIM, YEAH, I KNOW HIM REAL GOOD.

Q WAS HE BETTER FRIENDS WITH YOU OR WITH YOUR BROTHER?

A BOBBY JUST MET MY BROTHER.

Q SO, DO YOU THINK YOU'RE BETTER FRIENDS WITH HIM THAN YOUR BROTHER IS?

A BASICALLY, WE'RE ASSOCIATES. YOU DON'T HAVE NO FRIENDS IN JAIL. YOU GOT ASSOCIATES.

Q ACQUAINTANCES, ASSOCIATES, IS THAT THE SAME DIFFERENCE?

A YEAH. BOBBY MET MY BROTHER IN THE COUNTY, HE DIDN'T KNOW HIM ON THE STREET.

Q I GOTCHA. BUT YOU DID KNOW BOBBY ON THE STREET.

A YEAH.

Q AND THE ONLY THING YOU KNOW BOBBY DOES IS STEAL CARS AND HE HAS A TEMPER?

A I KNOW HE STEAL CARS.

[239] Q YOU DON'T KNOW ANYTHING ABOUT HIM HAVING A TEMPER?

A NAH.

Q SO, YOU SAY IN THIS THING THAT YOU SIGNED AND WAS NOTARIZED THAT ANYTHING BASICALLY THAT HURT BOBBY ISN'T TRUE IN HERE. IS THAT RIGHT?

A SAY AGAIN?

Q ANYTHING IN HERE THAT HURT BOBBY HOLMES YOU'RE SAYING IS NOT TRUE, RIGHT? IN OTHER WORDS, YOU CAN'T SAY HE HAS A TEMPER?

A NO.

Q EVEN THOUGH IT WAS IN HERE, RIGHT? YOU CAN'T SAY THAT BOBBY HOLMES WAS TALKING TO YOU AND ASKED YOU IF YOU KNEW JIMMY WHITE. YOU'RE SAYING THAT'S NOT CORRECT NOW?

A I WAS TALKING TO CHARLES RANDOLPH.

Q OKAY. SO, THAT'S NOT CORRECT. ANYTHING CONNECTING BOBBY HOLMES TO THIS THING IS NOT CORRECT. EVEN YOU AND BOBBY GREW UP TOGETHER ISN'T CORRECT. YOU JUST KNOW HIM?

A I KNOWED HIM. NO, WE DIDN'T GROW UP TOGETHER, NOW.

Q OKAY. LET'S GO TO THE NEXT ONE. ALL RIGHT. THE NEXT ONE I HAVE IS GOING TO BE THE ONE FROM MAY OF '97. LET ME LET YOU TAKE A LOOK AT THAT SO EVERYBODY WILL KNOW WHAT WE'RE TALKING ABOUT.

FOR THE DEFENSE, THAT'S GOT 4263 AT THE BOTTOM OF [240] IT. NOW, THIS WAS IN THE PCR HEARING. YOU GAVE THIS STATEMENT IN '97. IS THAT RIGHT? DO YOU NEED A SECOND A LOOK AT IT?

A IN '97?

Q YES SIR.

A WHO I GAVE THIS TO?

Q WELL, UNDOUBTEDLY, ULTIMATELY IT WAS GIVEN TO MR. HOLMES' DEFENSE ATTORNEYS AGAIN, BECAUSE AGAIN I RECEIVE THIS AS A COPY OF THE MOTION.

A OKAY, YEAH.

Q THAT WAS BACK IN '97 WHEN THEY WERE TRYING TO OVERTURN IT ON A PCR. YOU KNOW WHAT A PCR IS?

A YES SIR.

Q SO, THEY HAD COME AND TALKED TO YOU IN '97. ARE YOU AWARE OF THAT?

A YES SIR. YEAH, I REMEMBER.

Q AND THIS ONE, AND I'M JUST GOING BACK TO THE FRONT, NOW. INCARCERATED AT MURRAY FACILITY AT BROAD RIVER CORRECTIONAL FACILITY. BOBBY LEE HOLMES WAS ON THE SAME STATUS AT BROAD RIVER R&E. WHILE WE WERE OUT IN THE YARD ON RECREATION ONE DAY I SPOKE WITH BOBBY LEE HOLMES WHO ASKED IF I KNEW JIMMY WHITE. JIMMY WAS ALSO IN MURRAY FACILITY AND I KNEW WHO HE WAS. I SPOKE TO JIMMY WHITE AND TOLD HIM THAT I HAD TALKED TO BOBBY LEE HOLMES."

NOW, IS THAT TRUE?

[241] A NAH.

Q THAT'S NOT TRUE, OKAY. "JIMMY WHITE THEN TOLD ME THAT THE POLICE HAD ARRESTED BOBBY HOLMES FOR A CRIME HE, BOBBY HOLMES, DID NOT HAVE ANYTHING TO DO WITH."

IS THAT RIGHT?

A SAY AGAIN?

Q I'M JUST READING THE LINE. JIMMY WHITE TOLD YOU THE POLICE HAD ARRESTED BOBBY HOLMES FOR A CRIME THAT HE, BOBBY HOLMES DID NOT HAVE ANYTHING TO DO WITH.

A WELL, BASICALLY . . . NAH. JIMMY DIDN'T SAY IT LIKE THAT. HE DIDN'T SAY IT LIKE THAT.

Q SO, THAT'S NOT REALLY ACCURATE EITHER, RIGHT?

A JIMMY JUST SAID HE ADMIT THAT HE BROKE INTO THE LADY'S HOUSE AND RAPED HER.

Q BROKE INTO HER HOUSE AND RAPED HER?

A YES SIR.

Q OKAY. AND THEN YOU SPOKE TO JIMMY WHITE A FEW TIMES AFTER THAT BUT NEVER GOT BOBBY HOLMES, RIGHT?

A NO SIR.

Q IS THAT CORRECT OR NOT?

A I SPOKE TO JIMMY WHITE A FEW TIMES.

Q EVEN AFTER THAT?

A I NEVER TALKED TO BOBBY. NAH. I DIDN'T SPEAK TO HIM NO MORE.

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[246] Q THAT NIGHT THROUGH THREE-WAY CALLING I SPOKE TO BOBBY HOLMES AND TOLD HIM I HAD BEEN VISITED BY SMITH AND POTTS AND WHAT WAS DISCUSSED. IS THAT RIGHT?

A YES SIR.

Q OKAY. SO YOU CALLED BOBBY HOLMES THAT NIGHT AND TOLD HIM EXACTLY WHAT YOU WERE TALKING ABOUT, RIGHT?

A YES SIR.

Q HOW'D YOU KNOW HOW TO GET IN TOUCH WITH BOBBY HOLMES?

A HE WAS AT THE DETENTION CENTER WITH MY BROTHER.

Q AS A MATTER OF FACT, ONE TIME HE TRIED TO PUT YOUR BROTHER ON THE MAILING LIST OR THE VISITATION LIST OR SOMETHING, DIDN'T HE?

A I DON'T KNOW. I CAN'T SAY FOR SURE.

Q THE NEXT DAY BOBBY HOLMES' ATTORNEY, GERALD SMITH, CAME TO SEE ME AND TOLD ME I SHOULD STAY OUT OF THE HOLMES CASE. IS THAT RIGHT?

A NAH, IT AIN'T. GERALD SMITH CAME DOWN – WHEN MS. POTTS AND MR. SMITH LEFT OUT OF THE OFFICE, THEN GERALD SMITH CAME IN. IT WASN'T THE NEXT DAY, IT WAS FIVE MINUTES LATER.

Q SO, THIS AFFIDAVIT YOU SIGNED FOR THE COURT IN '97 [247] IS NOT CORRECT ON THAT PART, EITHER, RIGHT?

A NAH, NAH, NO SIR. TO TELL YOU THE TRUTH, IT AIN'T.

Q OKAY. BUT YOU SIGNED IT, DIDN'T YOU?

A YES SIR, I SIGNED IT.

Q AND YOU SAID THAT IF YOU WERE CALLED TO WITNESS YOU WOULD TESTIFY TO THE SAME INFORMATION CONTAINED IN THIS AFFIDAVIT, DIDN'T YOU?

A YEAH, THAT COULD BE TRUE, YEAH.

Q BUT THAT'S NOT TRUE, THOUGH, IS IT? YOU SAID YOU'D TESTIFY TO THAT INFORMATION WHEN YOU SWORE TO IT, BUT YOU DIDN'T, DID YOU?

A I AIN'T NEVER SWORE. I AIN'T NEVER SWORE. SEE, PRIOR TO THIS STATEMENT RIGHT HERE. THIS ONE IS JUST – IT'S – MOST OF THE THINGS IN HERE I CAN SAY A LITTLE BIT, I APPROVE OF. WHOEVER WAS TYPING IT JUST WASN'T TYPING IT RIGHT.

Q IS THAT IT?

A I KNOW FOR A FACT THAT IT WASN'T.

Q THEY WASN'T TYPING IT RIGHT. LET ME ASK YOU, GERALD SMITH COMES THE NEXT DAY. YOU SAID THAT WASN'T RIGHT.

A NAH. SMITH DIDN'T COME THE NEXT DAY. HE COME ABOUT FIVE MINUTES AFTER, BECAUSE MR. SMITH AND MS. POTTS WAS UP THERE IN OPERATIONS. THEY LEFT OUT. HE WALKED AROUND THE CORNER.

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[258] Q SO, YOU'VE GOT WHAT, THREE DIFFERENT TIMES COUNTING TODAY?

A WELL, THE TIME IT BE GOING ON, MR. POPE, IT WAS ALL ACCURATE AT THE SAME TIME IN MY PRESENCE, RIGHT. YOU KNOW, TIME, IT WASN'T THAT LONG. IT WASN'T NO NEXT DAY. IT WAS THAT SAME DATE. WHEN THEY LEFT OUT, MR. SMITH CAME IN. IT WAS JUST PLAIN AND SIMPLE. THE ONLY THING YOU CAN DO IS CHECK THE RECORDS AT KIRKLAND WHEN THEY LOGGED IN AT THAT TIME.

Q THE ISSUE HERE, MR. WESTBROOK, IS YOUR VERACITY AND YOUR TRUTHFULNESS.

A YES SIR.

Q AND A MINUTE AGO, YOU ADAMANTLY TOLD ME, OH, THEY ABOUT PASSED EACH OTHER. THEY CAME RIGHT IN AFTER THE OTHER.

A YES SIR, THEY DID.

Q BUT THEN, ONE TIME YOU SAID IT WAS ONE DAY AND ONE TIME YOU SAID IT WAS ANOTHER?

A NO, YOU SAID ONE DAY. I DIDN'T.

Q I'M SORRY, SIR. THE DOCUMENT YOU SIGNED SAID ONE DAY, DIDN'T IT?

A WELL, I SIGNED IT. YEAH, I DID SIGN IT.

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[260] A NAH. JIMMY WHITE, ME AND JIMMY WHITE WAS NEVER AT KIRKLAND TOGETHER. WE WAS AT BROAD RIVER.

Q BECAUSE THE TRUTH OF THE MATTER, JIMMY WHITE, BACK THEN IN '93, WHEN BOBBY

HOLMES' TRIAL WAS STARTING, WAS OUT. HE WAS UP HERE AT YORK, WASN'T HE?

A I DON'T KNOW. BUT I'M SAYING IN '90 I MET JIMMY WHITE. I DIDN'T MEET JIMMY WHITE IN '93. I MET JIMMY WHITE IN '90.

Q I'M NOT TALKING ABOUT MEETING. I'M TALKING ABOUT YOU SAID RIGHT THERE THAT BOOT SMITH AND B. J. POTTS ARE TALKING TO JIMMY WHITE IN YOUR PRESENCE IN THE YARD. IT'S NOT EVEN CLOSE. I MEAN, IT'S IN THE YARD. HE WASN'T IN THE YARD, WAS HE?

A COULDN'T BE. HE WASN'T TALKING TO THEM IN MY PRESENCE. I DON'T KNOW WHERE THEY GET THAT FROM.

Q SO, THAT CAME OUT FROM SOMEWHERE, RIGHT?

A WELL, THEY MUST HAVE BEEN TAKING THE WRONG INFORMATION DOWN.

Q AND PUTTING IT, AND AGAIN, YOU SIGNED IT, RIGHT?

A YEAH, I SIGNED IT.

Q OKAY.

* * *

[263] Q AND THAT'S THE ONLY TIME WE EVER TALKED?

A YEAH.

Q NOW, LET'S SEE. I JUST WANT TO MAKE SURE. TELL THE COURT WHAT HAPPENED. MY PEOPLE WANTED TO MAKE YOU COME TO MAKE YOU LOOK LIKE A RAT. NOW, THESE ARE JUST THE NOTES I TOOK. IF YOU WANT TO CHANGE IT, NO PROBLEM.

THEY WANTED YOU TO SAY ALL THESE THINGS ABOUT BOBBY HOLMES, RIGHT?

A THEY TOLD ME TO SAY THEM.

Q OKAY, TOLD YOU TO SAY THEM.

A YES SIR.

Q HE TOLD YOU THAT WE HAD SOME UNDERWEAR – YOU CORRECT ME IF I'M WRONG. WE HAD SOME UNDERWEAR THAT WAS SOMEBODY ELSE'S UNDERWEAR THAT WE'RE PUTTING ON BOBBY HOLMES. SO WE GOT SOMEBODY TO TESTIFY TO THAT, RIGHT?

A NO. HE DIDN'T TELL ME THAT.

Q THAT'S WHAT YOU SAID EARLIER, WASN'T IT?

A HE TOLD ME SPECIFICALLY – HE TOLD ME THAT I HAD TO GO IN THE COURTROOM, TELL THE JUDGE AND JURY THAT BOBBY HOLMES RAPED THE LADY, SODOMIZED HER AND TOOK FORTY DOLLARS FROM HER WHEN HE BROKE INTO HER HOUSE. AND HE GOT SOME WATCHDOG ATTORNEY FROM D. C. REPRESENTING HIM TRYING TO SAY HE DID IT.

Q MR. NEAL WAS SAYING THAT?

A YEAH. AND MR. PETE SKIDMORE, WHO'S REPRESENTING [264] HIM, HE'S A HOMOSEXUAL.

Q NOW, HE SAID THAT JUST IN THE CONVER – HE DON'T KNOW YOU FROM NOTHING. Y'ALL ARE TALKING AND HE JUST TELLS YOU THAT?

A NAH. MR. NEAL SAY HE BEEN KNOWING ME FOR SIXTEEN YEARS, BUT I TOLD HIM I CAN'T RECALL, REMEMBER HIM. HE SAY HE BEEN KNOWING ME FOR SIXTEEN YEARS FROM ROCK HILL.

Q SO, WHAT DOES SAYING MR. SKIDMORE IS A HOMOSEXUAL HAVE TO DO WITH TRYING TO CONVINCE YOU TO COOPERATE WITH US?

A BECAUSE – HE WAS, LIKE, PETE COME TO SEE YOU. HE SAY, WHO DO YOU THINK PETE IS? I SAY, WELL, PETE IS THE LAWYER, AIN'T HE. HE SAY NO. HE SAY, WHAT DID PETE TELL YOU HE WORKED? I SAY, PETE TOLD ME HE WORKED FOR THE DEFENSE. HE SAID, OH, OKAY, HE COME TO SEE YOU, HE SAY. I SAY, YES SIR. HE SAID, WELL, WHAT DID PETE SAY TO YOU? I SAY, PETE DIDN'T SAY NOTHING TO ME. HE WAS ASKING ME A COUPLE OF QUESTIONS AND I TOLD HIM – I DIDN'T TELL HIM WHAT PETE TOLD ME. I SAY, PETE TOLD ME HE WAS GONNA GET BACK WITH ME, HE'LL BE COMING TO SEE ME BACK AGAIN.

Q OKAY. NOW WHAT DID THAT HAVE TO DO WITH HIM SAYING HE WAS A HOMOSEXUAL?

A BECAUSE I ASKED HIM. I THOUGHT I WAS COMING UP TO [265] SEE MY LAWYER. THAT'S HOW THE CONVERSATION CAME UP. I WAS COMING UP TO SEE MY LAWYER AND I SAY, WELL, IS PETE

HERE. MR. THOMPSON, SAYS, NAH PETE AIN'T YOUR LAWYER. HE DON'T NEED TO BE HERE UNLESS YOU BEEN CHARGED FOR A CRIME. AND I WAS, LIKE, I THOUGHT I COMING TO SEE PETE. THAT'S WHAT GALLARDO AND PULLIAM DONE TOLD ME.

Q ALL RIGHT.

A AND THEN THEY EXPLAINED THE SITUATION WHY I, THAT THEY CAME UP HERE FOR YOU TO SEE ME.

Q OKAY.

A AND THAT I WAS COMING TO SEE AN ATTORNEY NAMED MR. THOMPSON. I TOOK IT AS I WAS COMING UP ON POST CONVICTION.

Q I GOTCHA.

A AND THAT'S HOW PETE BEING A HOMOSEXUAL CAME UP AND THAT WATCHDOG ATTORNEY. THAT'S HOW IT CAME UP. ASK MR. NEAL. HE KNOW. HE WAS THERE. HE SAID IT.

Q HE SAID PETE WAS A HOMOSEXUAL?

A YEAH.

Q I APOLOGIZE. I CAN'T UNDERSTAND HOW THAT – HOW IS THAT GOING TO MAKE YOU HELP US?

A BECAUSE – NAH. BASICALLY, I WAS ASKING HIM, DID I WANT TO SEE HIM. THAT'S WHO I WAS COMING TO SEE. HE BROUGHT UP ALL THAT.

Q THAT THEY GOT A WATCHDOG FROM WASHINGTON AND A [266] HOMOSEXUAL –

A A WATCHDOG ATTORNEY TRYING TO SAVE BOBBY HOLMES, REPRESENTING BOBBY HOLMES.

Q OKAY. LET'S GO BACK. HE TOLD YOU – AGAIN, MR. NEAL – AND THE TWO GUARDS AND MR. NEAL AND MR. THOMPSON WERE IN THERE, RIGHT?

A YEAH, AND YOU CAME IN.

Q RIGHT. WE'VE BEEN THROUGH THAT, RIGHT?

A YEAH.

Q WE'RE CLEAR ON THAT, RIGHT, OTHER THAN YOU SAYING THAT I SNATCHED YOU UP?

A YEAH.

Q THESE GUYS CONFIDED IN YOU THAT WE DIDN'T HAVE A PALM PRINT OF BOBBY HOLMES ON THE DOOR?

A NO. HE SAID, HE CAN – HE SAID THAT THE PALM PRINT THAT HE CONFISCATED FROM BOBBY HOLMES HE CAN LINK IT TO BOBBY HOLMES IN THE HOUSE.

Q RIGHT. SO THAT'S NOT WHAT YOU EXACTLY SAID THE FIRST TIME. AND AGAIN, I APOLOGIZE. I WAS WRITING NOTES. THE FIRST TIME I THOUGHT –

A NAH.

Q – YOU SAID – I'M NOT TRYING TO PUT WORDS IN YOUR MOUTH. I JUST WANT TO BE SURE I UNDERSTAND YOU. THE FIRST TIME, DIDN'T YOU SAY THAT THEY DIDN'T HAVE THE PALM PRINT?

[267] A NO, THAT AIN'T WHAT I SAID.

Q OKAY, WHAT'D YOU SAY?

A I SAID THAT MR. CHUCK NEAL TOLD ME ABOUT THE PALM PRINT.

Q CHUCK –

A THE PALM PRINT, THAT HE CONFISCATED A PALM PRINT OUT OF THE COUNTY JAIL FROM BOBBY HOLMES OFF THE DOOR. AND HE CAN LINK IT TO BOBBY HOLMES IN THE HOUSE.

Q OKAY, THAT'S WHAT –

A THAT'S WHAT HE TOLD ME.

Q SO, NOW, THEY'VE GOT A PALM PRINT OFF THE DOOR. MR. NEAL TOLD YOU, NOW, WE'RE FRAMING BOBBY HOLMES, ACCORDING TO MR. NEAL, RIGHT? RIGHT?

A YOU GOT –

Q IS THAT WHAT YOU SAID?

A THAT'S WHAT HE SAID.

Q OKAY, SO –

A NOT WHAT I SAID. THAT'S WHAT MR. NEAL SAID.

Q SO, MR. NEAL TELLS YOU – THAT'S WHAT I'M SAYING, THAT'S WHAT YOU HEARD.

A YES SIR.

Q OKAY. SO MR. NEAL TELLS YOU WE FRAMED UP BOBBY HOLMES. ONE WAY WE FRAMED UP BOBBY HOLMES IS WE GOT HIS PALM PRINT OFF THE DOOR AT THE JAIL AND WE'RE GOING TO STICK IT AND PRETEND LIKE IT'S FROM THE HOUSE, RIGHT?

[268] A YEAH.

Q AND MR. –

A AND SOME UNDERWEAR.

Q WELL, I'M GOING TO GET TO THAT.

A I KNOW YOU ARE.

Q MR. NEAL TOLD YOU THAT, RIGHT?

A YES SIR.

Q TOLD YOU THAT AND YOU SAID YOU AIN'T GONNA COOPERATE ANYWAY AND YOU'RE FRIENDS WITH BOBBY. BUT HE'S GONNA TELL YOU THAT?

A NO. BEFORE I EVEN – WHEN I WAS SETTING DOWN HE HAD BROUGHT OUT ALL THOSE FACTS TO ME.

Q OH, I SEE. BEFORE HE KNEW THAT YOU WEREN'T GONNA COOPERATE WITH HIM HE WAS KIND OF GIVING YOU THE INSIDE ON WHAT'S GOING ON ABOUT FRAMING BOBBY?

A NO. WHAT I SHOULD SAY.

Q OKAY.

A WHAT HE WANTED ME TO SAY.

Q WELL, WHY WOULD HE TELL YOU HE GOT STUFF OUT OF THE JAIL. HE DIDN'T NEED YOU TO SAY THAT. WE HAD THAT, RIGHT?

A I KNOW. HE SAY HE DIDN'T NEED ME. THE ONLY THING HE SAY HE NEEDED ME TO COME SAY IS BECAUSE, THE ONLY THING HE NEEDED ME TO SAY IS THAT BOBBY HOLMES TOLD ME HE RAPED THE OLD LADY, BROKE INTO HER HOUSE, STOLE [269] FORTY DOLLARS, SODOMIZED HER.

Q AND THAT WAS EXACTLY WHAT HE WANTED YOU TO SAY ABOUT BOBBY HOLMES?

A YEAH.

Q WELL, LET ME ASK YOU THIS, WHAT ABOUT THE UNDERWEAR? YOU STARTED SAYING AND I INTERRUPTED YOU. WHAT ABOUT THE UNDERWEAR? WHAT DID HE TELL YOU ABOUT HOW WE'RE GOING TO FRAME BOBBY HOLMES WITH THE UNDERWEAR?

A HE SAID THAT HE HAD GOT SOME UNDERWEAR FROM THE COUNTY JAIL FROM BOBBY HOLMES. THAT'S ALL HE JUST SAID. AND HE GOT A PALM PRINT FROM THE COUNTY JAIL OFF THE DOOR FROM BOBBY HOLMES AND WE CAN'T LINK HIM TO THAT. BUT THE JUDGE MIGHT NOT LET THE JURY INTRODUCE THAT AS EVIDENCE, SO WE NEED YOU TO COME UP HERE AND TESTIFY THAT BOBBY HOLMES TOLD HE TOOK FORTY DOLLARS

FROM THAT LADY AND RAPED HER AND BROKE INTO HER HOUSE.

Q SO, THE THING ABOUT THE UNDERWEAR – DID I UNDERSTAND YOU ONE TIME TO SAY THAT HE SAID WE HAD SOMEBODY ELSE'S UNDERWEAR?

A THAT'S WHAT – YEAH, YES SIR.

Q SO, HE SAID WE HAD SOMEBODY ELSE'S UNDERWEAR WE WERE GONNA PUT ON BOBBY BASICALLY, RIGHT?

A THAT'S WHAT MR. NEAL SAID.

Q NOW, ARE YOU AWARE THAT THE TRUTH OF THE MATTER IS WE GOT BOBBY HOLMES' PALM PRINT OFF THE DOOR IN THAT [270] WOMAN'S HOUSE THAT WAS KILLED? ARE YOU AWARE OF THAT?

A I AIN'T AWARE OF THAT.

Q OKAY.

A YOU GOT TO TALK TO MR. NEAL ABOUT THAT.

Q OKAY.

A HE BROUGHT OUT THOSE FACTS TO ME FIRST. I DIDN'T KNOW NOTHING ABOUT HIM.

Q OKAY. DO YOU KNOW ANYTHING ABOUT THE FACT THAT WE GOT BOBBY HOLMES' UNDERWEAR WITH THAT WOMAN'S BODILY FLUIDS INSIDE OF THEM?

A I DON'T KNOW. MR. NEAL TOLD ME A DIFFERENT STORY, MR. POPE.

Q SO HE WAS TELLING YOU A STORY ABOUT HOW WE'RE GOING TO FRAME SOMEBODY?

A THAT'S WHAT HE TELL ME.

Q ALL RIGHT.

A BOTH OF THEM, TOO, SITTING RIGHT THERE. THEY CAN TELL YOU.

* * *

[Defense Witness James White –
Direct Examination By Mr. MacDougall]

[289] Q WERE YOU EVER CHARGED WITH ASSAULT AND BATTERY?

A BACK WHEN I WAS IN JUVENILE. I HAD HIT A AUNT.

Q DID WHAT?

A I HAD HIT A AUNT, AUNT CARRIE, CARRIE HOLMES. SHE HAD SLAPPED ME AND WE WAS OVER AT CLYDE'S. I WAS REALLY TALKING TO THIS GIRL NAMED BRENDA MOBLEY AND PAUL. HER BROTHER NAME PAUL. THEY WAS SUPPOSED TO HAVE BEEN MY WITNESS. BUT THEN THEY DIDN'T HAVE NOTHING TO DO WITH THAT WHEN WE IN FRONT OF THE JUDGE.

AND WE WAS OVER AT CLYDE'S AND SHE SAY – I WAS ABOUT FIFTEEN OR SIXTEEN YEARS OLD. SHE KEPT ON TELLING ME I NEED TO BE WITH MY YOUNG SELF AT HOME AND ALL THAT LIKE THAT.

Q THIS WAS YOUR AUNT?

A NO, THAT'S HIS AUNT.

Q HIS AUNT?

A I THINK. AND SHE KEPT ON SAYING I NEED TO BE MY YOUNG SELF AT HOME. I NEED TO BE MY YOUNG SELF AT HOME. AND I JUST – BACK THEN I HAD A REAL BAD TEMPER AND EVERYTHING. AND I SAY, I SAY YOU DON'T TELL ME WHAT TO [290] DO. AND I CURSED HER OUT AND ALL THAT. SHE SAY SHE'LL SLAP ME. AND I TOLD HER IF SHE SLAP ME I WAS GONNA HIT HER BACK. SHE SLAPPED ME AND I HIT HER BACK.

AND SHE FELL DOWN AND I GUESS SHE HIT HER JAW, LIKE, ON THAT CONCRETE. AND THEN SHE TOOK ME TO COURT WHEN I WAS A JUVENILE. I DID TIME AT THE JUVENILE FOR THAT.

Q HOW ABOUT CRIMINAL DOMESTIC VIOLENCE? WERE YOU EVER CHARGED WITH THAT?

A YES SIR. THAT'S RIGHT. FIGHTING DUDES, THOUGH, THAT'S ALL.

Q IN 1992, YOU WERE CHARGED WITH CRIMINAL DOMESTIC VIOLENCE IN 1992?

A WAS THAT WITH MY GIRLFRIEND, BETSY BROWN?

Q I'M JUST ASKING YOU.

A I DON'T –

Q MR. WHITE, –

A NO, I CAN'T REMEMBER.

Q MR. WHITE –

A I COULDN'T REMEMBER.

Q MR. WHITE, THE WAY IT'S GOING TO WORK HERE IS I'M GOING TO ASK QUESTIONS AND I'LL ASK YOU TO ANSWER THEM. IF YOU DON'T UNDERSTAND MY QUESTION, YOU ASK ME TO CLARIFY IT. ARE YOU OKAY ON THAT?

A OH, YEAH.

Q OKAY. YOU TESTIFIED A FEW MINUTES AGO THAT THE ONLY [291] TIMES YOU'VE BEEN ARRESTED INVOLVED DISORDERLY CONDUCT OR DRIVING UNDER THE INFLUENCE.

I'M NOW ASKING YOU, IN 1992 WERE YOU CHARGED AND, IN FACT, CONVICTED OF CRIMINAL DOMESTIC VIOLENCE?

A I CAN'T REMEMBER.

Q YOU DON'T REMEMBER?

A NO SIR.

MR. MacDOUGALL: I WILL HAVE THIS MARKED. THIS IS A DOCUMENT BEARING STAMP NUMBERS 000892 THROUGH 896, MARKED ARREST RECORD. I'M GOING TO SHOW THE WITNESS PAGE BEGINNING WITH 3/28/92.

Q FIRST OF ALL, MR. WHITE, DO YOU RECOGNIZE THAT AS YOUR ARREST RECORD?

MR. POPE: YOUR HONOR, I DON'T OBJECT, BUT COULD HE SHOW HIM THE ENTIRE RECORD AND GIVE YOU A COPY?

A I CAN'T EVEN READ THIS.

THE COURT: WHY DON'T YOU MAKE IT AN EXHIBIT AND HAND IT TO ME AND I'LL. . . . I'M NOT TRYING TO TELL YOU WHAT TO DO BUT I THINK THAT MIGHT BE THE QUICKEST AND I CAN PERUSE IT.

MR. MacDOUGALL: YES SIR.

Q LET ME GO BACK TO WHERE I WAS, MR. WHITE. IN 1992 WERE YOU CHARGED AND, IN FACT, CONVICTED OF CRIMINAL DOMESTIC VIOLENCE?

A I AIN'T – THE ONLY THING – I AIN'T DID NO STATE [292] TIME FOR NO CRIMINAL DOMESTIC VIOLENCE. I MIGHTA BEEN IN JAIL OR TO THE CHAIN GANG FOR THAT. I HADN'T GOT BUT TWO OF THEM ON MY RECORD. I GOT ONE THAT I'M IN THE COUNTY JAIL RIGHT NOW FOR THAT. AND THEN I GOT ONE, THAT MIGHTA BEEN MY GIRLFRIEND, BETSY BROWN. ME AND HER GOT IN A FIGHT A COUPLE OF TIMES.

Q WHAT DID YOU DO TO BETSY BROWN WHEN YOU GOT IN A FIGHT?

A WE DO FIGHTING, YOU KNOW.

Q DID YOU HIT HER?

A WE FIGHT.

Q DID YOU HIT HER?

A NO, I DIDN'T HIT HER. I PUSHED HER DOWN.

Q DID SHE FALL?

A HUH?

Q DID SHE FALL?

A I GUESS SHE DID, YEAH.

Q DID SHE GET HURT?

A NO, SHE DIDN'T GET HURT.

Q HOW ABOUT BOBBY LEE'S AUNT, WHEN YOU HIT HER IN THE JAW, DID SHE GET HURT?

A NO. SHE WENT TO COURT.

Q YOU TESTIFIED A FEW MINUTES AGO YOU HIT HER IN THE JAW.

A SHE DIDN'T GO TO THE HOSPITAL.

[293] Q WERE YOU CHARGED IN 1993 WITH AGGRAVATED BATTERY OF A HIGH AND AGGRAVATED NATURE? I'M SORRY. ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE?

A SIR, I CAN'T REMEMBER ALL THIS STUFF FROM WAY BACK THEN. I DON'T KNOW ABOUT THAT. LIKE I SAY, I MIGHTA WOULD, BECAUSE I WAS PRETTY BAD BACK THEN. I WAS WANTING TO FIGHT ALL THE TIME, FIGHT ALL THE TIME. DRUNK, JUST FIGHTING.

Q DID YOU –

A BUT MOST OF THE TIME I LOST THE FIGHT.

Q DO YOU FIGHT ANYMORE?

A NO, I QUIT THAT. I'M IN HERE NOW FOR CRIMINAL DOMESTIC VIOLENCE, ME AND MY GIRLFRIEND. THE GIRL I GO WITH NOW, ME AND HER NEPHEW GOT INTO IT BACK ON THE FOURTH OF, FOURTH OF – IT WAS ABOUT JUNE SOMETHING. IT WAS BEFORE THE FOURTH OF JULY. AND HE GOT OUT AND THEY MET ME OUT ON THE ROAD AND EVERYTHING.

Q DID YOU HIT HIM?

A NAH. NO. WE JUST – MY GIRLFRIEND TOLD HIM WE WAS FUSSING AND ARGUING AND EVERYTHING LIKE THAT. AND WHEN THE POLICE GOT THERE I WAS DRUNK AND I WAS TALKING BACK TO THE POLICE AND THEY JUST TOOK ME TO JAIL. I WAS CURSING AND GOING ON, ALL LIKE THAT.

Q DO YOU GET VIOLENT WHEN YOU GET DRUNK, MR. WHITE?

A NOT REALLY, NO.

[294] Q NOT ANY MORE THAN USUAL?

A NOT THAT I KNOW OF.

Q SO, WHEN YOU TESTIFIED A FEW MINUTES AGO THAT YOU HIT BOBBY HOLMES' AUNT, WERE YOU SOBER?

A I WAS SOBER THEN.

Q HOW ABOUT WHEN YOU GOT IN A FIGHT WITH YOUR GIRLFRIEND'S NEPHEW YOU TALKED ABOUT A LITTLE WHILE AGO, WERE YOU SOBER?

A NO, WE WAS DRINKING. I WAS ON MY WAY TO GETTING DRUNK.

Q HOW ABOUT 1993 WITH YOUR GIRLFRIEND, WERE YOU SOBER OR DRUNK?

A I WAS PROBABLY DRUNK. I CAN'T REMEMBER IT. MAN, THAT WAS A LONG TIME AGO. I AIN'T REMEMBER NOTHING LIKE THAT.

Q A LONG TIME AGO. A LOT HAS HAPPENED SINCE THEN, HASN'T IT?

A HUH?

Q A LOT HAS HAPPENED SINCE THEN, HASN'T IT?

A A LOT.

Q LET'S GO BACK TO 1989, DECEMBER 30, 1989. DO YOU REMEMBER THAT NIGHT? THAT WAS A LONG TIME AGO, TOO.

A DO WHAT, NOW?

Q DECEMBER 30, 1989, DO YOU REMEMBER THAT NIGHT?

A DO I REMEMBER?

[295] Q DO YOU REMEMBER –

A WHAT, WHAT?

Q – WHAT YOU WERE DOING DECEMBER 30, 1989?

A I DON'T KNOW WHAT I WAS DOING. WHAT I SUPPOSED TO KNOW? TELL ME WHAT HAPPENED THAT NIGHT.

MR. MacDOUGALL: YOUR HONOR, MAY I APPROACH THE WITNESS?

THE COURT: SURE.

MR. MacDOUGALL: I BELIEVE THIS HAS ALREADY BEEN MARKED AS A COURT'S EXHIBIT.

MR. POPE: NO OBJECTION.

MR. MacDOUGALL: THIS IS COURT'S EXHIBIT ONE, YOUR HONOR. MAY I APPROACH?

THE COURT: SURE.

Q MR. WHITE, I'D LIKE YOU TO TAKE A LOOK AT WHAT I'VE JUST HANDED YOU WHICH HAS BEEN MARKED AS COURT'S EXHIBIT ONE.

A (NO RESPONSE)

Q YOU CAN'T READ IT?

A NO, NOT MOST OF THE WORDS.

MR. MacDOUGALL: WITH THE COURT'S PERMISSION I WILL READ IT FOR THE WITNESS.

THE COURT: YES SIR.

Q MR. WHITE, AS I READ THIS, IF THERE IS ANYTHING THAT I MISPRONOUNCE OR YOU DON'T UNDERSTAND, LET ME KNOW.

[296] "THIS IS MY VOLUNTARY STATEMENT DATED APRIL 2, 1990. PLACE, BROAD RIVER CENTER; TIME STARTED, 1:31 P.M. UNDERSIGNED JAMES McCAW, A/K/A JIMMY WHITE AT TWENTY-THREE YEARS OF AGE. MY DATE AND PLACE OF BIRTH BEING THE TWENTY-SEVENTH DAY OF MARCH, 1967. AND YOU ARE COUNTY 7270625, AN INMATE OF THE BROAD RIVER CENTER, 4460 BROAD RIVER ROAD, COLUMBIA, SOUTH CAROLINA. ANSWERING ANY QUESTIONS OR MAKING ANY STATEMENTS, SERGEANT JAMES A. SMITH, YORK CITY POLICE OFFICER, 29210."

AND THE HANDWRITTEN PART READS AS FOLLOWS: "ON FRIDAY, DECEMBER 29, 1989 I STAYED IN SHARON, SOUTH CAROLINA. I DIDN'T GO TO YORK UNTIL SATURDAY NIGHT ABOUT TEN P.M. I WAS AT MY BROTHER'S PLACE IN SHARON FRIDAY NIGHT. ALEX McCOY IS MY BROTHER. HE RUNS THE SHACK IN SHARON. I LIVES NEXT TO IT. ON SATURDAY, JUNIOR LYTER, (JOSHUA LYTER) AND MICHAEL BURKIN RODE WITH US TO CLYDE'S PLACE. WE GO TO CLYDE'S ABOUT TEN P.M. JUNIOR AND MICHAEL WENT TO THE CARPET NIGHTCLUB. I STAYED AT CLYDE'S. I DIDN'T LEAVE THERE UNTIL THOSE FELLOWS, JUNIOR AND MICHAEL, CAME BACK FROM THE CARPET. WHILE AT CLYDE'S I DRANK SOME BEER AND DANCED. JUNIOR AND I WAS THE ONLY ONE WHO WENT TO SHARON THAT NIGHT. WE LEFT CLYDE'S ABOUT ONE-THIRTY A.M. AND ARRIVED AT MY HOUSE ABOUT TWO A.M. ON 12/31/89. I HAD TO KNOCK ON THE DOOR [297] TO GET IN. MAMA, CARRIE LEE McCOY, OPENED THE DOOR AND I WENT IN AND WENT TO BED.

I GOT UP LATER THAT MORNING AND WALKED DOWN TO JUNIOR'S HOUSE. SOME OF THE FELLOWS WAS TALKING ABOUT SOME LADY GOT RAPED IN YORK. I DIDN'T KNOW THE LADY. I HEARD BOBBY HOLMES DID IT. I KNOW I DIDN'T DO IT.

ABOUT A MONTH BEFORE THE LADY GOT RAPED I WAS OVER AT CLYDE'S AND NEEDED A RIDE HOME. I KNEW TINA HOLMAN. I ASKED HER HOW SHE WAS TRAVELING. SHE SAID HER BROTHER, JUNE BUG. I TOLD HER TO ASK JUNE BUG FOR A RIDE. THEY GAVE ME A RIDE IN A LITTLE BLUE STATION WAGON.

LATER I FOUND OUT IT (STATION WAGON) WAS STOLEN. BOBBY HOLMES' DADDY AND MICHAEL BURKINS' MOTHER ARE SISTER AND BROTHER. THIS IS ALL I KNOW. I DIDN'T RAPE NO WOMAN OR BEAT NO WOMAN."

WERE YOU ABLE TO FOLLOW THAT WITH ME, MR. WHITE?

A UH-HUH.

Q LET ME ASK THE QUESTION AGAIN NOW THAT YOUR RECOLLECTION HAS BEEN REFRESHED. DO YOU RECALL THE NIGHT OF DECEMBER 30, 1989?

A I THINK I REMEMBER IT.

Q IS THAT YOUR SIGNATURE IN THE LOWER RIGHT-HAND CORNER OF THAT DOCUMENT?

A YEAH.

Q IS THAT YOUR HANDWRITING OR IS THAT BOOT SMITH'S [298] HANDWRITING?

A WHEREABOUTS?

Q AT THE –

A MY NAME?

Q NO, NOT YOUR NAME, THE WRITTEN PART, THE TEXT. THE PART I JUST READ. DID YOU WRITE THAT YOURSELF OR DID BOOT SMITH WRITE IT?

A I THINK HE WROTE IT.

Q YOU DON'T RECOGNIZE THAT AS YOUR HANDWRITING?

A NO, THAT AIN'T MY WRITING.

Q BUT THAT IS YOUR SIGNATURE?

A YEAH, THAT'S MY SIGNATURE.

Q IS EVERYTHING IN THIS STATEMENT TRUE?

A EXCEPT ONE PART. WHEN WE WENT BACK TO SHARON, JUNIOR AND MICHAEL WENT BACK WITH US.

Q MICHAEL WHO?

A MICHAEL BURKINS.

Q WHEN YOU WENT BACK WHERE?

A WHEN WE WENT BACK HOME, WHEN WE LEFT CLYDE'S.

Q SO, YOU SAY THAT'S INCORRECT?

A YEAH. IT WASN'T NO JUST ME AND JUNIOR WENT BACK HOME. MICHAEL WAS WITH US.

Q SO, YOUR TESTIMONY IS THAT JUNIOR LITTLE DROVE YOU HOME?

A YEAH.

[299] Q WHO WAS DRIVING?

A HE WAS.

Q AND ANYONE WHO TESTIFIED THAT JUNIOR LYTER DIDN'T GIVE YOU A RIDE HOME THAT NIGHT BE TELLING THE TRUTH?

A WELL, HE SAID HIMSELF, HE AIN'T GETTING INVOLVED WITH THIS OR NOTHING LIKE THAT RIGHT THERE. HE SAYING HE AIN'T GIVE ME NO RIDE HOME. SO I AIN'T GOT NO WITNESS, YOU KNOW.

Q HOW DO YOU KNOW HE'S BEEN SAYING HE DIDN'T GIVE YOU A RIDE HOME?

A BECAUSE THAT'S WHAT EVERYBODY'S BEEN TELLING ME. HE EVEN TELL ME HIMSELF.

Q WHO'S BEEN TELLING YOU?

A HIS DADDY, YOU KNOW. A LOT OF PEOPLE TELLS ME HE SAY WELL, . . . THEY EVEN TOLD ME. THEY SAID JUNIOR SAID HE DID GIVE YOU NO RIDE HOME.

* * *

[303] Q YOU WERE AT HOME WHEN?

A WE LEFT THAT PLACE ROUND ABOUT ONE. I THINK IT DON'T TAKE BUT ABOUT FIFTEEN MINUTES TO GET TO SHARON. SO, ABOUT ONE-FIFTEEN OR TWO. IT WAS ANYWHERE CLOSE TO THERE.

Q THAT'S WHEN YOU GOT HOME?

A YEAH.

Q SO, ANYONE WHO SAW YOU AFTER THAT OUTSIDE YOUR HOME WOULD NOT BE TELLING THE TRUTH. IS THAT RIGHT?

A YEAH.

Q SO, YOUR TESTIMONY HERE IS AFTER ONE-FIFTEEN YOU COULD NOT HAVE BEEN ANYWHERE NEAR PECAN COURT OR CALIFORNIA STREET?

A NO.

Q YOUR TESTIMONY WOULD BE, THEN, I TAKE IT, THAT ANYONE WHO SAW YOU ON PECAN COURT OR CALIFORNIA STREET AFTER TWO A.M. WOULD BE LYING?

A SURE WOULD BE.

Q YOUR TESTIMONY IS THAT IF ANYONE, INCLUDING YOUR FOSTER MOTHER. YOUR STEPMOTHER TESTIFIED YOU CAME IN [304] AFTER TWO A.M., THAT WOULD BE UNTRUE?

A NO, THE ONLY THING – I DID NOT SAY THAT. IT WAS ANYWHERE FROM ONE TO TWO SOMETHING. THAT'S WHAT I JUST NOW SAID THAT.

Q DO YOU KNOW –

A AND IF I WAS ANYWHERE OVER THAT WAY, LIKE I SAID, I BE DRUNK AND, LIKE, IF I WOULD HAVE BEEN THERE ANYWAY. AIN'T NO WAY I COULD HAVE GOT TO SHARON THAT FAST, DRUNK AS I BE. AND THEY'D HAVE GOT ME RIGHT THEN AND THERE, YOU KNOW. I'D BEEN – DRUNK AS I BE.

Q HOW'D YOU GET AWAY?

A THAT'S WHAT I'M TELLING YOU NOW. HOW DID I GET AWAY? YOU TELL ME THAT.

Q DO YOU KNOW AN INDIVIDUAL BY THE NAME OF STEPHEN WESTBROOK?

A (NO RESPONSE)

Q STEPHEN WESTBROOK?

A DONALD, DONALD WESTBROOK.

Q I'M SORRY?

A I KNOW A DUDE NAMED DONALD WEST-BROOK.

Q WERE YOU EVER IN MARION DORM AT BROAD RIVER?

A YEAH.

Q IN 1990?

A YEAH.

* * *

[305] Q DID YOU TELL MR. WESTBROOK IN 1990 THAT YOU HAD ATTACKED MARY STEWART, BROKE INTO HER HOUSE AND RAPED HER?

A SHOOT, NO. MAN, IF I'D – MAN, IF I WOULD HAVE DID SOMETHING LIKE THAT I WOULDN'T TELL IT. I AIN'T GOT NO EDUCATION, BUT I AIN'T CRAZY. I WOULDN'T TELL NOBODY NO STUPID STUFF LIKE THAT.

* * *

[308] Q IN THE PRESENCE OF THOMAS WHITE – I'M SORRY. IN THE PRESENCE OF THOMAS MURRAY IN 1992, DID YOU ADMIT THAT YOU HAD ATTACKED, RAPED AND KILLED MARY STEWART AND THAT BOBBY LEE HOLMES WAS ACCUSED WRONGLY?

A I TELL YOU, I JUST TOLD YOU, I AIN'T TOLD NOBODY NOTHING LIKE THAT. THEY GOT – THEY CAN'T PUT NO WORDS IN MY MOUTH. I AIN'T – WHAT YOU THINK, I'M STUPID OR SOMETHING? DAMN.

Q MR. WHITE, DO YOU KNOW AN INDIVIDUAL BY THE NAME OF JOHN DICKSON?

A WHO IS THAT?

Q JOHN DICKSON, DO YOU KNOW JOHN DICKSON?

A HUH-UH.

Q DID YOU KNOW JOHN DICKSON WHEN YOU WERE INCARCERATED IN THE YORK COUNTY DETENTION CENTER?

A HUH? THEY WOULDN'T EVER LET ME STAY IN THE DETENTION CENTER. THEY ALWAYS RUN ME BACK TO YORK.

[309] Q DID YOU TELL JOHN DICKSON THAT YOU HAD COMMITTED THE CRIME AGAINST MRS. STEWART AND YOU WERE OFF THE HOOK BECAUSE THEY HAD ALREADY CHARGED BOBBY LEE HOLMES?

A SHOOT, NO. MAN, HOW MANY TIMES I HAVE TO TELL YOU? IF I DIDN'T TELL THEM, WHAT YOU THINK I'M GONNA TELL HIM THAT FOR?

Q DO YOU KNOW NANCY BENNETT?

A NANCY BENNETT? NO, NOT THAT I CAN RECALL OF.

Q DO YOU RECALL EVER GOING INTO THE YORK COUNTY PUBLIC DEFENDER'S OFFICE?

A I AIN'T HAD BUT ONE PUBLIC DEFENDER IN MY WHOLE LIFE AND THAT WAS MR. BOYD, JOE BOYD. THAT I KNOW OF, ANYWAY.

Q DID YOU GO IN THE YORK COUNTY PUBLIC DEFENDER'S OFFICE AND TELL MS. BENNETT IN 1992 THAT YOU KNEW WHO ATTACKED MARY STEWART AND –

A I AIN'T NEVER BEEN –

Q – AND IT WASN'T BOBBY HOLMES?

A – TO NO PUBLIC DEFENDER'S OFFICE.

Q YOU'VE NEVER BEEN IN THE YORK COUNTY PUBLIC DEFENDER'S OFFICE. IS THAT WHAT YOU'RE SAYING?

A NOT UNLESS – THE ONLY TIME I EVER BEEN TO A PUBLIC DEFENDER'S OFFICE IS WHEN THE

OLD COURTROOM WAS OPEN. THAT'S THE ONLY TIME I EVER BEEN IN A PUBLIC DEFENDER'S OFFICE. I DON'T EVEN KNOW WHERE THE PUBLIC DEFENDER'S OFFICE AT.

* * *

[314] Q NOW, MOVING FURTHER DOWN, HE, MEANING YOU, MR. WHITE, ALSO – I'M TWO SENTENCES DOWN FROM WHERE I WAS. "HE ALSO ACKNOWLEDGES ASSAULTING ANOTHER WOMAN WITH BRASS KNUCKLES AGE SIXTEEN DURING AN ARGUMENT IN A BAR AND SERVED ANOTHER SEVEN MONTHS AT BIRCHWOOD." IS THAT YOU?

A NAH, NOT NO BRASS KNUCKLES.

Q YOU JUST HIT –

A I AIN'T NEVER USED NO BRASS KNUCKLES IN MY LIFE.

Q WHAT'D YOU HIT HER WITH?

A WHO?

Q THE WOMAN THAT YOU HIT WHEN YOU WERE SIXTEEN?

A I THINK THAT WAS A LIE. IT WAS WITH MY HAND. I THINK THAT WAS A LIE.

Q MR. WHITE, FURTHER DOWN –

MR. MacDOUGALL: YOUR HONOR, MAY I APPROACH?

THE COURT: YES SIR.

Q LET ME SHOW YOU WHERE I'M GOING TO BE, MR. WHITE. STARTING WHERE IT SAYS IMPRESSIONS AND RECOMMENDATIONS.

[315] DO YOU SEE WHERE I AM? I'M READING THE SECOND SENTENCE UNDER IMPRESSIONS AND RECOMMENDATIONS.

"HE DID NOT PRESENT GROSS PHYSICAL ABNORMALITIES, ALTHOUGH HIS HYGIENE WAS MARGINAL. HIS ARM INCLUDED SMALL SCARS, REPORTEDLY FROM FIGHTS WITH HIS GIRLFRIEND AND OTHER MALES."

DID YOU TELL MR. WARREN THAT YOU HAD SCARS ON YOUR ARMS FROM FIGHTS WITH YOUR GIRLFRIEND AND OTHER MALES?

A MAN, I DON'T – JUST LIKE I KEEP – I DON'T EVEN KNOW WHO YOU TALKING ABOUT.

Q I'M TALKING ABOUT YOU, MR. WHITE.

A I'M TALKING ABOUT WHO WROTE THIS. I DON'T EVEN THE DUDE WHO YOU TALKING ABOUT.

Q I'M GOING TO ASK YOU TO GO TO THE BOTTOM OF THE PAGE AND I'M GOING TO READ YOU THREE SENTENCES AT THE END OF THE LAST LINE.

MR. MacDOUGALL: MAY I APPROACH, YOUR HONOR?

THE COURT: CERTAINLY.

Q THE LAST LINE ON THIS PAGE READS AS FOLLOWS: "SEXUAL FANTASIES WITH THEMES OF

DOMINANCE AND CONTROL APPEAR TO DOMINATE HIS PSYCHE AND COULD BE MANIFESTED ON A BEHAVIORAL LEVEL AT INAPPROPRIATE TIMES AND PLACES. HE WOULD BE MOST UNPREDICTABLE IN HIS RESPONSE TO THREAT OR PRESSURE TO PERFORM. AND CRIMES COMMITTED BY THIS CLIENT WILL USUALLY BE SENSELESS AND DISORGANIZED, SUCH [316] THAT HE WOULD BE EASILY APPREHENDED."

IS HE TALKING ABOUT YOU THERE? DO YOU HAVE FANTASIES OF –

A NAH.

Q – OF DOMINANCE?

A HUH-UH. I DON'T HAVE NO KIND OF – WHEN I GOT – WHEN I GOT OUT OF PRISON, I GOT OUT OF PRISON IN '97. AND I MET THIS GIRL, THE ONE I'M WITH NOW. I WENT WITH THE GIRL, BETSY BROWN, POSSIBLY I WENT WITH HER, I THINK I WAS FIFTEEN AND SHE WAS TWENTY-FIVE AND SOMETHING LIKE THAT. I BEEN WITH HER FOR THIRTEEN YEARS. THAT'S THE ONLY GIRL I EVER MESSED WITH. AND I GOT WITH THIS GIRL RIGHT HERE AND I GO WITH HER FOR THREE YEARS. AND I STILL AIN'T MESSED WITH ANOTHER GIRL. AND THE ONLY REASON I WON'T MESS WITH NO GIRL RIGHT NOW IS BECAUSE I'M SCARED ONE OF THEM MIGHT BE SOME KIN TO HIM AND GO TELL SOMEBODY I RAPED HER AND GET SOMEBODY ELSE TO BEAT HER UP. I AIN'T STUPID, NAH. I DON'T NEED BUT ONE GIRL. AND I DON'T FANTASIZE ABOUT

THEM, 'CAUSE I GOT ONE. I SLEEP WITH ONE EVERY NIGHT WHEN I AIN'T IN HERE.

* * *

[322] A NO. I ASKED HIM WOULD I HAVE TO BE IN COURT. HE SAY THEY PROBABLY WOULD BRING ME TO COURT. AND I TOLD HIM, DID HE REALLY THINK I DID I'1. HE SAY NO. I SAY DO THEY GOT EVIDENCE ON HIM. AND HE SAY YEAH. THEN HE TOLD ME WHAT ALL THEY HAD. AND SAY, DO Y'ALL GOT EVIDENCE ON ME. HE SAY AIN'T NONE OF MINE MATCH.

* * *

STATE OF SOUTH CAROLINA	) COURT OF GENERAL : SESSIONS
COUNTY OF YORK	) SIXTEENTH JUDICIAL : CIRCUIT
THE STATE, PLAINTIFF, VERSUS BOBBY LEE HOLMES, DEFENDANT.	) VOLUME II : TRANSCRIPT OF RECORD) 90-GS-46-1196 : 90-GS-46-1197) 90-GS-46-1198 : 90-GS-46-1200) AUGUST 15, 2000 : YORK, SOUTH CAROLINA

BEFORE:

THE HONORABLE JOHN C. HAYES III, JUDGE

APPEARANCES:

FOR THE STATE:

THOMAS E. POPE, ESQ., SOLICITOR
KEVIN S. BRACKETT, ESQ.,
DEPUTY SOLICITOR
WALTER W. THOMPSON, ESQ.,
ASSISTANT SOLICITOR

FOR THE DEFENSE:

WILLIAM N. NETTLES, ESQ.
JAMES W. MORTON, ESQ.
MARK J. MacDOUGALL, ESQ.
ELIZABETH R. YANG, ESQ.

* * *

[Defense Witness Delores Brown –
Direct Examination By Mr. MacDougall]

[5] Q AND 203 CALIFORNIA STREET IS AN APARTMENT?

A YES, IT IS.

Q DOES IT FACE ON CALIFORNIA STREET?

A YES.

Q I'D LIKE TO TAKE YOU BACK TO DECEMBER OF 1989, THE NIGHT OF DECEMBER THIRTIETH, GOING INTO THE THIRTY-FIRST. DO YOU REMEMBER THAT NIGHT?

A YES SIR.

Q WHAT WERE YOU DOING THAT NIGHT?

A WELL, THAT NIGHT, OR LATE THAT MORNING I GOT UP TO GO TO THE BATHROOM. WHEN I GOT UP I LOOK OUT THE WINDOW AND I SEE A YOUNG MAN WALKING DOWN THE STREET.

Q YOU WERE HOME THAT NIGHT?

A YES, I WAS.

Q WHO WAS HOME WITH YOU?

A MY LITTLE GIRL.

Q AND WHAT TIME DID YOU WAKE UP THE MORNING OF THE THIRTY-FIRST?

A IT WAS ABOUT FOUR OR FIVE O'CLOCK IN THE MORNING.

Q CAN YOU BE ANY MORE SPECIFIC?

A NO, I CAN'T BE ANY MORE SPECIFIC.

Q IS THAT THE CUSTOMARY TIME THAT YOU WAKE UP IN THE MORNING?

A SOMETIMES.

[6] Q DID YOU LOOK OUT THE WINDOW IN THE COURSE OF GETTING UP?

A I DID LOOK OUT THE WINDOW.

Q AND WHAT DID YOU SEE?

A I SEE A YOUNG MAN WALKING DOWN THE STREET, CALIFORNIA STREET.

Q DID YOU RECOGNIZE THE YOUNG MAN?

A UH-HUH.

Q WHO WAS HE?

A JIMMY, JIMMY WHITE.

Q HOW DID YOU KNOW IT WAS JIMMY WHITE?

A BY HIS WALK, THE WAY HE WALK, AND I KNOW JIMMY.

Q HOW LONG HAD YOU KNOWN JIMMY?

A OH, ABOUT TEN OR THIRTEEN YEARS.

Q AND IN WHAT WAY DID YOU KNOW HIM, WAS HE A FRIEND OR . . . ?

A WHERE I STAY HE USED TO COME BY, YOU KNOW, AND TALK TO US, STUFF LIKE THAT. HE USED TO COME BY.

Q AND VISIT YOUR FAMILY AT HOME?

A NOT MY FAMILY. HE WOULD JUST STOP AND TALK TO US A LOT. HE WOULD SEE ME AND STOP TO TALK.

Q NOW, DID YOU KNOW MARY STEWART?

A I KNEW OF MRS. STEWART, BUT I DIDN'T KNOW MRS. STEWART.

Q DID YOU KNOW WHERE MRS. STEWART LIVED?

[7] A YES SIR.

Q NOW, YOU'RE AT 203 CALIFORNIA STREET?

A YES SIR.

Q AND IT'S BETWEEN FOUR AND FIVE O'CLOCK IN THE MORNING. YOU LOOK OUT, AND I BELIEVE YOUR TESTIMONY WAS THAT YOU SAW JIMMY WHITE WALKING DOWN CALIFORNIA STREET?

A YEAH, DOWN CALIFORNIA STREET.

Q DID YOU KNOW WHERE MARY STEWART LIVED?

A YES SIR.

Q WAS HE WALKING TOWARD OR AWAY FROM WHERE MRS. STEWART LIVED?

A WELL, SHE STAY . . . JIMMY WALKING DOWN CALIFORNIA STREET.

Q HE'S WALKING DOWN CALIFORNIA STREET. IS THAT TOWARD MRS. STEWART'S HOUSE?

A TOWARD MRS. STEWART'S, BUT, YOU KNOW, WHICH WAY HE WENT, I DON'T KNOW, I CAN'T SAY.

Q YOU COULDN'T SEE WHERE HE WENT?

A HUH-UH, NO.

Q DID YOU SEE ANYONE ELSE THAT MORNING AFTER YOU GOT UP?

A NO, NOBODY.

Q AND WERE YOU VISITED LATER THAT DAY BY A POLICE OFFICER?

A THAT MORNING I WAS, YOU KNOW, POLICES CAME BY THAT [8] MORNING.

Q DO YOU REMEMBER ABOUT WHAT TIME?

A HUH-UH, I DON'T KNOW WHAT TIME HE CAME BY.

Q DO YOU REMEMBER THE OFFICER'S NAME OR WHAT HE LOOKED LIKE?

A I DON'T REMEMBER BECAUSE SOME OF THEM MIGHT BE DONE COME, AND I DON'T REMEMBER WHO IT WAS.

Q WHAT DID THE POLICE OFFICER ASK YOU?

A THEY ASK ME DID I SEE ANYTHING THAT MORNING AND I TOLD THEM I SEE A YOUNG MAN WALKING DOWN THE STREET THAT MORNING.

Q DID YOU TELL THEM WHO THE YOUNG MAN WAS?

A UH-HUH, I TOLD THEM IT WAS JIMMY WHITE.

Q DID THE OFFICER SAY ANYTHING?

A HE DIDN'T SAY ANYTHING ELSE.

Q WAS HE MAKING NOTES WHILE HE TALKING TO YOU?

A HUH-UH.

Q I'M SORRY?

A NO, HE WASN'T DOING NOTHING. HE WAS JUST ASKING QUESTIONS AND I JUST TOLD HIM WHAT I KNOW AND THAT WAS IT.

* * *

[26] Q FROM THE TIME THE POLICE OFFICER CAME IN THE MORNING AFTER MRS. STEWART WAS ATTACKED IN 1989, YOU TESTIFIED THAT HE TOOK NO NOTES, DID HE EVER COME BACK?

A NO, NEVER DID.

Q AND BETWEEN THE TIME THAT THE POLICE OFFICER CAME ON DECEMBER 31, 1989 AND TWO OR THREE WEEKS AGO, DID ANYONE FROM THE YORK COUNTY POLICE CONTACT YOU ABOUT WHAT YOU SAW AT ALL?

A NO, HUH-UH.

* * *

[Defense Witness John Dixon –
Direct Examination By Mr. MacDougall]

[30] Q DID YOU, WHILE YOU WERE AT YORK COUNTY DETENTION CENTER, HAVE CONTACT WITH AN INDIVIDUAL BY THE NAME OF JIMMY WHITE?

A YES SIR.

Q HOW DID YOU KNOW JIMMY WHITE?

A I KNEW HIM BEFORE WHEN I WAS COMING TO DO TIME IN THE YORK COUNTY DETENTION CENTER. BUT KNOWING OF HIM, I DID; BUT KNOWING HIM, I DIDN'T.

Q DID YOU GROW UP WITH HIM?

A NO SIR.

Q YOU SAID YOU KNEW HIM BEFORE COMING TO THE DETENTION CENTER?

A I KNEW HIM PRIOR TO THE YORK COUNTY DETENTION CENTER.

Q WERE YOU PRESENT AT ANY TIME WHEN ANY OTHER INMATES DISCUSSED WITH MR. WHITE THE ATTACK AND THE SUBSEQUENT DEATH OF MARY STEWART?

A YEAH, THOMAS WALKER, THOMAS MURRAY AND THE OTHER GUY I DON'T RECALL.

Q SO, PRESENT WHEN THIS CONVERSATION TOOK PLACE WAS JIMMY WHITE, THOMAS WALKER, MR. MURRAY AND YOURSELF?

A YEAH.

Q WHERE DID THE CONVERSATION TAKE PLACE?

[31] A WE WAS PLAYING CARDS WHERE THE CONVERSATION TOOK PLACE AT THE COUNTY; I MEAN, AT THE PRISON FARM. WE WAS PLAYING CARDS AND THOMAS MURRAY ASKED JIMMY WHITE, BEING THAT BOBBY ALREADY GOT THE TIME FOR IT, WHY DON'T YOU GO ON AHEAD AND 'FESS UP TO IT. AND HE SAY WHAT'S DONE IS ALREADY DONE. AND HE SAID IT IN THAT EXACT WORDS.

Q HE SAID IT IN THOSE EXACT WORDS?

A YEAH.

Q DID HE SAY ANYTHING ELSE ABOUT IT?

A NO.

Q DID MR. MURRAY OR MR. WALKER DISCUSS IT WITH HIM FURTHER WHILE YOU WERE THERE?

A I DON'T KNOW.

Q DID YOU EVER TALK TO MR. WHITE?

A NO.

Q MR. DIXON, IN MAY OF THIS YEAR ABOUT THREE MONTHS AGO, DO YOU RECALL SIGNING AN AFFIDAVIT IN CONNECTION WITH THIS CASE?

A YES SIR.

MR. MacDOUGALL: MAY I APPROACH, YOUR HONOR?

THE COURT: CERTAINLY.

Q I'LL ASK YOU TO HAVE A LOOK AT THAT, PLEASE, AND TELL ME IF THAT AFFIDAVIT BEARS YOUR SIGNATURE?

A YEAH.

Q DID YOU SIGN THE AFFIDAVIT THAT DAY?

[32] A YES SIR.

Q DID YOU SIGN IT IN THE FORM IT'S IN?

A YES SIR.

Q WOULD YOU READ THE SECOND PARAGRAPH OF THAT AFFIDAVIT, PLEASE?

A WHAT IT SAY, I SERVED ON THE CHAIN GANG IN YORK COUNTY IN 1992 WITH JIMMY WHITE. DURING THIS TIME I HEARD A INMATE ASK MR. WHITE WHY HE WOULD NOT ADMIT TO THE CRIME THAT BOBBY LEE HOLMES WAS ON DEATH ROW FOR. JIMMY WHITE RESPONDED THAT IT'S ALL OVER AND DONE WITH IT AND BOBBY LEE HOLMES IS GOING TO DO THE TIME FOR IT.

THE COURT: WHAT'S THE DATE OF THAT?

A MAY 8.

THE COURT: THANK YOU. WAS THAT INCLUDED?

MR. POPE: I DON'T HAVE A COPY OF THAT.

THE COURT: I DON'T EITHER.

MR. MacDOUGALL: I'LL HAND ONE UP. I'M SORRY. I'LL SHOW THIS TO THE SOLICITOR.

Q NOW, THE AFFIDAVIT THAT YOU JUST READ FROM, WE'RE GOING TO MARK AS AN EXHIBIT IN JUST A MOMENT, YOU STATED THAT JIMMY WHITE RESPONDED THAT "IT WAS ALL OVER AND DONE WITH AND HE, BOBBY LEE HOLMES, IS GOING TO DO THE TIME FOR IT." IS THAT A CORRECT STATEMENT? IN YOUR AFFIDAVIT THAT STATEMENT IS CORRECT?

A YES SIR.

* * *

STATE OF SOUTH CAROLINA)
) COURT OF
COUNTY OF YORK) GENERAL SESSIONS

STATE OF SOUTH CAROLINA)
)
-V-) TRANSCRIPT OF RECORD
) 90-GS-46-1196-1197
BOBBY LEE HOLMES,)

AUGUST 21, 2000
YORK, SOUTH CAROLINA

BEFORE:

HONORABLE JOHN C. HAYES, III

APPEARANCES:

TOMMY POPE, SOLICITOR
WILLIE THOMPSON, ASSISTANT SOLICITOR
1675 1-A YORK HIGHWAY
YORK, SC 29745
ATTORNEY FOR STATE

JAMES M. MORTON, ESQUIRE
1601 RICHLAND STREET
COLUMBIA, SC 29201

WILLIAM NETTLES, ESQUIRE
914 RICHLAND STREET SUITE A-102
COLUMBIA, SC 29201
ATTORNEYS FOR THE DEFENDANT

* * *

[Defense Witness Thomas Murray – Direct]

[22] Q OKAY. MR. MURRAY, I'M GOING TO CUT TO THE CHASE HERE, IN 1992, WERE YOU ON THE CRAIN GANG HERE IN YORK COUNTY?

A YES, SIR.

Q AND AT THAT TIME WHO WAS, WAS JIMMY WHITE, AN INDIVIDUAL BY THE NAME OF JIMMY WHITE ON THE CHAIN GANG WITH YOU?

A YES, SIR.

Q AND DO YOU REMEMBER JIMMY WHITE MAKING ANY COMMENTS ABOUT WHETHER BOBBY LEE HOLMES IS THE PERSON WHO BEAT UP AND RAPED AND OLD LADY?

A YES, SIR.

Q DO YOU REMEMBER JIMMY WHITE COMMENTING ABOUT WHETHER HE IS THE PERSON WHO ACTUALLY COMMITTED THE CRIME THAT BOBBY LEE HOLMES CHARGED WITH?

A WELL, YOU KNOW HE DIDN'T ACTUALLY SAY. HE WAS JUST SAYING HE KNEW THAT BOBBY WAS INNOCENT THAT THEY COULDN'T BRING HIM TO COURT FOR IT.

[23] Q SO LET'S TALK ABOUT THAT STATEMENT THEN. THE STATEMENT HE MADE WAS, SAY THAT WHAT, DID YOU HEAR TEES FROM HIS MOUTH?

A YES, SIR.

Q DID YOU HEAR THOSE WORDS?

A YES, SIR.

Q TELL US WHAT YOU HEARD HIS MOUTH?

A I JUST HEARD HIM WHEN HE SAY LIKE HE KNEW THAT BOBBY WAS INNOCENT AND HOW THEY COULDN'T BRING HIM TO COURT FOR IT.

Q NOW TELL US A LITTLE BIT ABOUT WHERE IT WAS YOU HEARD THAT?

A AT THE OLD YORK COUNTY PRISON CAMP.

Q AND WHERE AT THE OLD YORK COUNTY PRISON CAMP?

A THEY HAD LIKE TABLES LINED UP WHERE WE USED TO PLAY CARDS AT IN THE HALL BETWEEN BEDS.

Q SO SORT OF LIKE A TIME OBVIOUSLY WHEN YOU WEREN'T WORKING ON THE CHAIN GANG?

A YES, WE'D BE OFF WORK.

Q OKAY. AND SO WERE YOU SITTING AT THE TABLE WITH JIMMY WHITE WHEN HE SAID THAT?

A NO, SEE JIMMY NEVER DEALT WITH US. HE WOULD ALWAYS SEEMED TO BE WITH OTHER PEOPLE.

Q WHY WOULD HE NEVER DEAL WITH YOU?

A SEE A LOT OF THE BOYS WANTED TO JUMP ON HIM.

[25] Q AND WAS MR. JIMMY WHITE WITH YOU AT THAT TIME AS WELL?

A ME AND HIM STAYED ON THE SAME SIDE IN THE SAME DORM.

Q AT THAT TIME DID YOU EVER HEAR JIMMY WHITE MAKE ADMISSIONS ABOUT HIS INVOLVEMENT IN A CRIME THAT BOBBY LEE HOLMES HAD BEEN CONVICTED FOR?

A HE JUST SAID AGAIN THAT HE KNEW THE MAN DIDN'T DO IT AND THEY COULD NOT BRING HIM BACK TO COURT FOR IT.

* * *

[Defense Witness Thomas Murray –
Cross By Mr. Pope]

[33] Q OKAY. SO THE ONLY THING AT THE CHAIN GANG IS THAT HE SAID THAT BOBBY WAS INNOCENT, IS THAT CORRECT?

A AND HOW HE KNEW THAT THEY COULDN'T BRING HIM TO COURT FOR IT.

Q COULDN'T BRING JIMMY WHITE TO COURT FOR IT?

A YEAH.

Q BOBBY WAS INNOCENT AND THEY COULDN'T BRING JIMMY WHITE TO COURT FOR IT.

A YES.

Q OKAY. SO WHEN YOU SAID THAT I HEARD A WITNESS JIMMY WHITE ADMIT TO THE CRIME THAT BOBBY LEE HOLMES IS ACCUSED OF THAT IS NOT CORRECT, IS IT?

A I DIDN'T NEVER SAY HE ADMITTED TO ME THAT HE DID IT. I DIDN'T SAY THAT.

Q THE GENERAL STATEMENT HE MADE YOU JUST READ INTO IT BASED ON WHAT YOU WERE HEARING AND WHAT YOU KNEW THEY WERE TALKING ABOUT?

A YEAH.

Q OKAY. SO ADMITTING TO THE CRIME, THIS LANGUAGE HERE THAT'S NOT EXACTLY WHAT YOU ARE SAYING?

A NO.

* * *

[34] Q JIMMY WHITE WAS BRAGGING TO RED?

A THAT'S RIGHT.

Q NOW DID YOU HEAR HIM BRAGGING TO RED?

A YES, I DID.

Q YOU SAY, OH, CALVIN CAME AND GOT YOU –

[35] A THAT'S RIGHT –

Q AND THEN YOU WENT AND HEARD HIM BRAGGING?

A YEAH, WE WENT DOWN THERE.

Q Y'ALL WENT DOWN THERE AND WHAT DID YOU HEAR?

A JUST WHAT HE SAID THE MAN WAS IN JAIL FOR NOTHING.

Q OKAY. BASICALLY THE SAME KIND OF THING?

A AND THEY COULD NOT BRING HIM BACK TO COURT FOR IT.

Q YOU NEVER HEARD JIMMY WHITE SAY I KILLED THAT WOMAN OR I RAPED THAT WOMAN?

A NO.

THE COURT: I DIDN'T HEAR THE ANSWER TO THAT.

A NO, SIR.

Q YOU SAID NO, OKAY. ALL RIGHT. YOU SAY KNOWLEDGE OF JIMMY WHITE COMMITTING THE CRIME, I'M JUST READING FROM YOUR AFFIDAVIT. I GOT A COPY IF YOU NEED TO TAKE A LOOK AT IT. I'M JUST READING NUMBER THREE. SAID KNOWLEDGE OF JIMMY WHITE COMMITTING THE CRIME WAS WIDESPREAD AND PUT HIM DANGER WITH OTHER ROCK HILL INMATES?

A I DIDN'T SAY NOTHING LIKE THAT.

Q YOU DIDN'T. YOU DIDN'T SAY NUMBER THREE?

A NOPE.

* * *

[36] Q OKAY. WHAT ABOUT NUMBER FOUR. IF YOU'D TAKE A LOOK AT THAT ONE. I BELIEVE JIMMY WHITE WAS FRAMED. JIMMY WHITE FRAMED BOBBY LEE HOLMES FOR CRIMES IN

RETRIBUTION FOR A DISPUTE HE AND HOLMES HAD IN YORK?

A I DIDN'T SAY NONE OF THAT BECAUSE I DON'T KNOW NOTHING ABOUT NOTHING WENT ON IN NO YORK.

Q YOU DON'T KNOW, YOU JUST KNEW HIM FROM BEING INSIDE?

A THAT'S RIGHT.

Q WHAT ABOUT I ALSO BELIEVE THAT BOBBY LEE HOLMES WAS ALSO INVOLVED IN A FIGHT WHEN THIS WAS COMMITTED?

A NO, THAT'S WHAT THEY SAY JIMMY SAID THAT, THAT BOBBY, SOMEHOW BOBBY SUPPOSED TO BEEN ON THE OTHER SIDE OF TOWN INVOLVED IN ANOTHER FIGHT OVER THERE WHEN HE WAS TELLING THE BOYS.

Q OKAY. THAT'S WHAT SOMEBODY ELSE SAID?

A NO, JIMMY SAID THAT.

[37] Q OKAY. SO THAT'S WHAT HE SAID BUT WHEN IT SAYS TALKING –

A THAT'S WHEN HE WAS SAYING HOW HE KNEW BOBBY WAS INNOCENT.

Q I GOT YOU. WHEN HE WAS TALKING BECAUSE HE HEARD HE HAD BEEN IN A FIGHT ON THE OTHER SIDE OF TOWN?

A YEAH.

Q WHAT DID YOU UNDERSTAND JIMMY SAYING, THAT HE WAS IN A FIGHT WITH BOBBY ON THE OTHER SIDE OF TOWN?

A NO, SIR.

Q OKAY. ALSO BELIEVED BOBBY HOLMES WAS ACROSS YORK. AS FAR AS YOU BELIEVE YOU DON'T KNOW NOTHING ABOUT THE YORK DEAL ONE WAY OR ANOTHER?

A NO, I DON'T KNOW NOTHING ABOUT YORK. I WASN'T IN NO YORK.

Q I GOT YOU. SO AS FAR AS NUMBER FOUR BEING SOMETHING THOMAS MURRAY BELIEVES, THAT'S NOT REALLY RIGHT, IS THAT RIGHT?

A NO.

* * *

[44] A AND HE WAS ASKING ABOUT SOME WOMAN. I TOLD HIM I NEVER SEEN NO WOMAN AND THAT'S ALL THAT WAS.

Q SO THE WOMAN THAT SIGNED NOTORIZED THAT SIGNATURE, THERE WASN'T A WOMAN THERE WHO NOTORIZED YOUR SIGNATURE ON THAT?

A NO, LIKE I TOLD HIM, I NEVER SEEN A WOMAN.

Q OKAY. DID YOU TELL HIM THAT THE STATEMENT ON THE AFFIDAVIT SAYING YOU OVERHEARD JIMMY WHITE ADMIT THAT HE COMMITTED THE CRIME AND NOT BOBBY HOLMES IS FALSE?

[45] A I DID NOT SAY I HEARD HIM ADMIT THAT HE DID IT.

Q I SEE THE DIFFERENCE OF WHAT YOU ARE SAYING.

A THAT'S WHAT I WAS TRYING TO GET HIM TO UNDERSTAND THAT DAY.

Q THAT'S WHAT THIS MAN NEEDS TO UNDERSTAND AND I'VE ASKED YOU THAT ABOUT FIVE TIMES.

A HE WAS JUST SAYING THAT HE KNEW BOBBY WAS INNOCENT. HE NEVER SAID THAT HE DID IT, NO.

Q GOT YOU. AND EVERYBODY HAS ASKED YOU QUESTIONS 20 DIFFERENT WAYS AND THAT'S WHAT YOU'VE BEEN TRYING TO TELL US?

A THAT'S RIGHT.

Q MR. MURRAY, I APPRECIATE IT. THANK YOU, SIR.

MR. NETTLES: ONE BRIEF THING, YOUR HONOR.

REDIRECT EXAMINATION BY MR. NETTLES:

Q MR. MURRAY, ON NUMBER THREE HERE, YOU SEE NUMBER THREE THERE. DO YOU REMEMBER TESTIFYING THERE WAS SOME PEOPLE THAT WANTED TO BEAT UP JIMMY WHITE WHENEVER YOU AND I WERE TALKING?

A YEAH, THAT'S WHAT I WAS SAYING. YOU KNOW, A LOT OF PEOPLE WANTED TO JUMP ON HIM.

* * *

[Defense Witness Mattie Scott – Direct]

[49] Q TELL US ABOUT WHEN DID YOU FIRST MEET JIMMY WHITE?

A OH, IT WAS IN OCTOBER OF 1997.

Q OKAY.

A HE CAME TO MY SONS HOUSE WITH A FRIEND OF HIS.

Q AND IT WAS AT YOUR SON'S HOUSE. WERE YOU AT YOUR SON'S HOUSE?

A YES.

Q AND HE CAME WITH A FRIEND OF HIS, DO YOU KNOW WHO THE FRIEND?

A BOBBY PATTERSON.

[50] Q BOBBY PATTERSON.

A UH-HUH. THEY WERE WORKING TOGETHER.

Q THEY WERE WORKING TOGETHER?

A AND HE CAME TO MY SON'S HOUSE WITH BOBBY.

Q OKAY. WHAT WAS GOING ON AT YOUR SON'S HOUSE?

A THEY WERE JUST HAVING LIKE A LITTLE GET TOGETHER, PLAYING CARDS, SITTING AROUND TALKING, DRINKING.

Q AND DO YOU REMEMBER, WERE YOU ABLE TO TELL US ABOUT WHAT JIMMY WHITE'S CONDITION WAS AT THE TIME HE GOT TO YOUR SON'S HOUSE?

A HE WAS, HE WAS PARTIALLY INTOXICATED.

Q OKAY. WAS HE FALLING DOWN, CRAWLING AROUND THE STREET DRUNK?

A NO.

Q DID ANYBODY AT THAT TIME IN YOUR PRESENCE, DID ANYONE EVER QUESTION HIM ABOUT HIS INVOLVEMENT IN THE MURDER?

A YES, THEY STARTED TALKING ABOUT THAT HE HAD KILLED, RAPED AND KILLED THE OLD LADY IN YORK.

Q WERE THEY DOING THAT IN HIS PRESENCE?

A YEAH, HE WAS TALKING TO THEM, TALKING WITH THEM.

Q DID, DID HE EVER DIRECTLY SAY ANYTHING ABOUT HIS INVOLVEMENT IN THAT CRIME?

A HE SAID, YES, I DID IT BUT HOLMES IS GOING TO [51] FRY FOR IT.

Q I'M SORRY. NOW I WANT TO BE CLEAR NOW. OUT OF JIMMY WHITE'S MOUTH YOU HEARD –

A YES.

Q – HIM SAY WHAT?

A HE SAID, YES, I DID IT BUT HOLMES IS GOING TO FRY FOR IT.

Q FRY FOR THIS –

A – RAPING AND KILLING THE OLD LADY.

Q THEY WERE TALKING ABOUT. NOW AT THAT TIME WHAT DID YOU DO AFTER YOU HEARD THAT?

A WELL, SEE I WASN'T EVEN REALLY SITTING THE LIVING ROOM. I JUST COME OUT OF THE LIVING ROOM THEN I WENT BACK IN MY BEDROOM AND LAID DOWN.

Q LET ME GET THIS STRAIGHT, YOU SAID YOU WERE IN YOUR BEDROOM AND YOU CAME OUT?

A YES. I WENT IN, SEE, I HAD GOT OFF WORK. I CAME HOME, CHANGED CLOTHES, AND THEN I CAME BACK OUT IN THE LIVING ROOM WHERE THEY WAS.

Q NOW WHENEVER THIS STATEMENT WAS MADE BY JIMMY WHITE, WERE YOU IN THE LIVING ROOM?

A I WAS IN THE LIVING ROOM THEN.

Q AND YOU SAW HIM SAY THAT?

A YES.

* * *

[56] Q OKAY. AND THEY GOT INTOXICATED AND YOU SAID THEY STARTED TALKING ABOUT JIMMY RAPING AND KILLING AN OLD LADY, IS THAT RIGHT?

A YES.

Q WHO IS "THEY"?

A IT WAS ABOUT, BOBBY PATTERSON WAS THERE, IT WAS BOBBY PATTERSON, REGGY GILL.

Q I'M SORRY GILL OR HILL?

A GILL.

Q OKAY.

A WHO ELSE WAS IT. EDDIE WOODS.

Q OKAY.

A AND IT WAS TWO OTHER, BOBBY PATTERSON'S GIRLFRIEND WAS THERE.

Q DO YOU KNOW WHO SHE IS?

A I DON'T KNOW HER NAME. I KNOW HER NAME IS SHELL. BUT I DON'T KNOW HER LAST NAME.

Q SHELL? S-H-E-L-L?

A UH-HUH. BUT I DON'T KNOW HER LAST NAME.

Q JIMMY WHITE COMES THERE AT JAMES' HOUSE AND HE'S PARTIALLY INTOXICATED AND EVERYBODY STARTS TALKING ABOUT RAPING AND KILLING?

A YEAH, AFTER THEY SITTING AROUND TALKING, DRINKING AND TALKING, THEY STARTED TALKING ABOUT IT.

A YEAH. IT WASN'T NO JUST ME AND JUNIOR WENT BACK HOME. MICHAEL WAS WITH US.

Q SO, YOUR TESTIMONY IS THAT JUNIOR LITTLE DROVE YOU HOME?

A YEAH.

* * *

[Defense Witness Ken Rhodes – Direct]

[63] Q DO YOU KNOW MR. JIMMY WHITE?

A YES, SIR, I'VE KNOWN HIM MOST OF MY LIFE.

Q OKAY. HOW WAS THAT?

A WELL, JUST HANGING OUT IN THE NEIGHBORHOOD.

Q OKAY. DID YOU RELATE TO ME AN INCIDENT ON MCCLAIN STREET SEVERAL YEARS AGO WHERE MR. WHITE MADE SOME STATEMENTS?

A YES SIR.

Q AND TELL THE COURT ABOUT THAT IF YOU WILL?

A WELL, LIKE I WAS SAYING JIMMY WHITE, YOU KNOW, HE THOUGHT ME AND HIM WAS LIKE

BROTHERS, SOMETHING ABOUT HIS DADDY CHARLIE SOMETHING LIKE [64] THAT, AND HE CONFIDED IN ME A LOT.

Q HE THOUGHT YOU WERE –

A A BROTHER.

Q AN ACTUAL BLOOD BROTHERS?

A RIGHT.

Q AND HOW, WHY DID HE THINK THAT AND WHAT DID HE TELL YOU ABOUT THAT?

A WELL, HE TOLD ME THAT, IN OTHER WORDS, I WAS TOO SMALL TO REMEMBER THAT HIS DADDY USED TO DATE MY MOM AND YOU KNOW THAT THEY WAS LIKE BROTHERS AND I TOLD HIM, AIN'T NO WAY POSSIBLE WE COULD BE BROTHERS, THAT MY DADDY'S NAME WAS WILLIAM HENRY HALL, YOU KNOW, AND WE SAT OUT IN THE YARD AND WE TALKED. WE WAS OVER AT SOME BENEFIELD'S HOME ON MCCLAIN STREET. I STAYED NEXT DOOR TO THEM.

Q WHEN WAS THIS?

A THIS WAS BACK IN '92.

Q DO YOU REMEMBER ABOUT WHAT MONTH IN '92?

A IT WAS AROUND THE FIRST OF THE YEAR. AROUND MARCH I THINK, I'M NOT SURE WHICH, IT'S BEEN AWHILE.

Q SO THIS WAS AT A HOUSE OVER ON MCCLAIN STREET.

A YES, SIR.

Q AND Y'ALL WERE BOTH THERE?

A RIGHT.

[65] Q OKAY. GO AHEAD.

A AND THEY WAS OUT DRINKING SOME VODKA.

Q WHO IS "THEY"? DO YOU REMEMBER WHO ALL?

A I THINK HIS NAME WAS WIRE HEAD BENEFIELD AND HE USED TO COME OVER THERE A LOT.

Q OKAY.

A AND I WAS WALKING UP THE STREET AND HE SAW ME AND HE CALLED ME OVER I WENT OVER AND WE TALKED AND ALL OF A SUDDEN, YOU KNOW, I JUST ASKED HIM, I SAID, JIMMY, A LOT PEOPLE RUNNING AROUND SAYING THAT YOU HAD SOMETHING TO DO WITH THIS LADY'S DEATH.

* * *

[66] Q EXCUSE ME FOR INTERRUPTING. GO AHEAD AND TELL ABOUT JIMMY WHITE CONFIDING WITH YOU THAT DAY AND WHAT HE SAID?

A WELL, I JUST ASKED HIM I SAID, WELL, JIMMY, YOU KNOW WORD IS ON THE STREET THAT YOU HAD SOMETHING TO DO WITH THIS LADY FROM CALIFORNIA STREET'S DEATH AND, YOU KNOW, HE PUT HIS HEAD DOWN AND HE RAISED HIS HEAD BACK UP AND HE SAID, WELL, YOU KNOW I LIKE OLDER WOMEN. AND I ASKED HIM

WHAT DID HE MEAN BY THAT, YOU KNOW, BECAUSE AT THE TIME I WAS DATING A WOMAN THAT WAS OUT THERE IN THE STREETS TOO, SO I DIDN'T, I ASKED HIM THAT BECAUSE I DIDN'T WANT HIM COMING AROUND HER AND HE NEVER CALLED THE LADY'S NAME BUT YOU KNOW HE SAY THAT HE LIKED OLD WOMEN AND THAT YEAH HE DID WHAT THEY SAY HE DID AND YOU KNOW THAT SOMEBODY ELSE WAS LOCKED UP FOR IT. AND YOU KNOW IT'S LIKE HE DIDN'T HAVE NO REGRETS ABOUT IT AT ALL.

[67] Q WHAT DID HE SAY HE DID?

A WELL HE TOLD, THE ONLY THING HE TOLD, HE DIDN'T SAY EXACTLY WHAT HE DONE, HE JUST TOLD ME THAT SHE HAD SOME GOOD STUFF.

Q THAT SHE HAD SOME GOOD STUFF?

A RIGHT.

Q AND WHO WAS HE TALKING ABOUT?

A IT WAS THE OLD LADY THAT SHE DIED.

Q OKAY. DID HE SAY THAT HE HAD RAPED HER OR KILLED HER OR ANYTHING, WHAT DID HE SAY?

A NO, HE TOLD ME THAT THE LADY YOU KNOW FOUND OUT THAT SHE HAD DIED. HE SAID THAT HE DIDN'T KILL THE LADY. THE LADY WAS ALIVE WHEN HE LEFT BECAUSE WHEN HE, WE USED TO HANG OUT AT THE NIGHT SPOT CALLED CLYDE'S AND WHEN HE'D GET TOO DRUNK TO GO HOME HE WOULD GO BY AND SPEND THE NIGHT OVER AT HER HOUSE OR SOME OTHER LADY'S

HOUSE THAT HE KNOWED, YOU KNOW. HE WOULD STAY IN YORK. HE WAS FROM SHARON.

Q HE WOULD GO OVER TO THE OLD LADY'S HOUSE AND STAY OVER THERE?

A I'VE KNOWN HIM TO GO OVER THAT WAY MAYBE TWO OR THREE TIMES.

Q AND WHERE IS THIS?

A OVER ON CALIFORNIA STREET APARTMENTS.

[68] Q TO STAY WITH AN OLD LADY OVER THERE?

A RIGHT. I DON'T KNOW WHO THE OLD LADY WAS, YOU KNOW. LIKE I SAY, WE MET UP AT THE CLUB.

Q OKAY. AND WHY DO YOU BELIEVE HE WAS CONFIDING IN YOU AT THIS POINT?

A WELL, LIKE I SAY HE THOUGHT, I GUESS HE FELT THE CLOSENESS THINKING THAT WE WAS BROTHERS, YOU KNOW.

Q HOW DID YOU REACT, KEN, WHEN HE TOLD YOU THIS?

A WELL, WHAT DID WAS I LEFT, YOU KNOW, BECAUSE A LOT OF PEOPLES IN YORK FEAR HIM BECAUSE OF THE WAY HE ACTUALLY IS, YOU KNOW.

Q HOW IS THAT?

A HE WAS REAL VIOLENT. HE WAS A VIOLENT PERSON.

Q OKAY.

A HE'S THE TYPE OF PERSON THAT HE JUST DIDN'T CARE.

Q HOW DID YOU FEEL WHEN HE TOLD YOU THAT, HOW DID YOU REACT?

A I LEFT. I WENT HOME AND SHORTLY AFTER THAT I MOVED BACK IN WITH MY MOM, LET THE HOUSE GO ON MCCLAIN STREET I WAS IN LIVING IN WAS OWNED BY MANNY BIGGERS AT FAITH REALITY AND I MOVED OUT OF THE HOUSE AND WENT BACK TO LIVE WITH MY MOM JUST SO HE COULDN'T FIND ME AGAIN BECAUSE IT [69] SEEM LIKE EVERY HOUSE THAT I WENT TO HE WOULD POP UP.

Q NOW KEN, YOU'VE BEEN CHARGED I THINK WITH AGGRAVATED ASSAULT, BURGLARY, AND GRAND LARCENY BEFORE, IS THAT RIGHT?

A THEY HAD ME CHARGED WITH ASSAULT AND BATTERY WITH INTENT TO KILL, GRAND LARCENY, ESCAPE, AND SECOND DEGREE BURGLARY.

Q AND YOU SERVED WHAT FIVE YEARS FOR THAT?

A FIVE YEARS AND ABOUT SEVEN MONTHS.

Q OKAY. NOW YOU'VE KNOWN JIMMY YOU SAY ALL YOUR LIFE?

A I'VE KNOWN HIM PARTICULARLY ALL MY LIFE.

Q ANY QUESTION IN YOUR MIND THAT HE WAS THE PERSON WHO WAS TELLING YOU THIS?

A HE WAS THE PERSON THAT WAS TELLING ME.

Q ANY QUESTION IN YOUR MIND THAT WHAT YOU TOLD ME HERE TOLD WAS HAPPENED OUT THERE THAT DAY IN 1992?

A WHAT DO YOU MEAN BY THAT?

Q I MEAN THERE IS NO QUESTION HE TOLD YOU THAT WHAT YOU TOLD THIS COURT?

A YES, HE DID.

Q DID HE SAY ANYTHING ABOUT MER. HOLMES? I MEAN, I KNOW THAT YOU SAID THAT JIMMY WHITE SAID THAT HE [70] WENT IN THE LADY'S HOUSE, HE DIDN'T KILL HER, DID HE SAY THAT BOBBY LEE HOLMES WAS DOING TIME FOR SOMETHING HE SHOULDN'T BE DOING OR ANYTHING TO THAT EFFECT?

A THE ONLY THING HE SAID ABOUT BOBBY WAS THE BOY DOING TIME FOR SOMETHING THAT HE DIDN'T REALLY DO AND I DON'T KNOW HOW TRUE IT WAS. HE SAY THAT HE TRIED TO LET SOMEONE KNOW THAT HE WAS THE ONE THAT DID IT AND I TOLD HIM, I SAY, WELL, JIMMY YOU KNOW YOU ARE LYING BECAUSE THEM POLICE OFFICERS UP THERE IN YORK, YOU TELL THEM, YOU GO UP

THERE AND TELL THEM PEOPLE THAT YOU ACTUALLY DID THIS THEY ARE GOING TO LOCK YOU UP FOR QUESTIONING, YOU KNOW, AND I LEFT IT AT THAT.

* * *

[Ken Rhodes – Cross]

[80] Q OKAY. SO YOU TALKED THAT ONE DAY IN MARCH OF '92, ALL THIS TOOK PLACE, IS THAT RIGHT?

A YEAH, I TALKED TO HIM BECAUSE I WANTED TO FIND OUT IF IT WAS ANY TRUTH OF WHAT WAS AROUND OUT ON THE STREETS.

Q SO YOU'RE CURIOUS?

A YEAH, I WANTED TO KNOW BECAUSE HE COMES AROUND MY KIDS A LOT.

Q ALL RIGHT. NOW YOU KNEW BOBBY HOLMES AT THAT TIME, IS THAT RIGHT?

A I HAVE MET HIM BEFORE THEN, YEAH.

Q YOU KNEW, YOU DIDN'T KNOW HIM THAT DAY. HE WAS INCARCERATED THEN?

A RIGHT.

Q BUT YOU KNEW HIM, YOU SAID YOU MET HIM IN THE '80'S?

A YEAH, SOMEWHERE IN THE '80'S.

Q AND Y'ALL WERE DEVELOPING A GOOD FRIENDSHIP?

A WELL, I FELT LIKE WE WAS, YEAH, DEVELOPING A GOOD FRIENDSHIP.

Q WHO BROKE IT OFF WHEN HE GOT ARRESTED?

A WELL, WHEN HE GOT LOCKED UP I COULDN'T SEE HIM. I DIDN'T HAVE NO, YOU KNOW, TRANSPORTATION.

Q DID YOU USE TO RIDE WITH HIM?

A EXCUSE ME?

[81] Q YOU SAID YOU DIDN'T HAVE ANY TRANSPORTATION, OH, YOU MEAN GO DOWN THE ROAD AND SEE HIM?

A RIGHT, EXACTLY.

Q I'M WITH YOU. SO BASICALLY Y'ALL'S FRIENDSHIP ENDED, Y'ALL DIDN'T HAVE ANY FALLING OUT OR ANYTHING. YOU JUST PRETTY MUCH AFTER JANUARY OF 1990 YOU COULDN'T SEE HIM ANYMORE?

A I COULDN'T SEE HIM.

Q WAS THERE EVER A TIME WHEN YOU WENT DOWN THE ROAD THAT YOU SAW HIM ANY TIME WHILE YOU WERE DOWN THERE?

A WELL FROM MY UNDERSTANDING WHEN I WENT DOWN THE ROAD HE WAS A LIEBER ON DEATH ROW AND WE CAN'T SEE PEOPLES THAT'S ON DEATH ROW.

Q SO HE MIGHT HAVE BEEN THERE BUT YOU NEVER GOT TO SEE HIM?

A I DON'T KNOW WHERE HE WAS AT BUT I NEVER SEEN HIM WHILE I WAS INCARCERATED.

Q HOW LONG WERE YOU FRIENDS THERE BACK IN '90 BEFORE HE WENT TO JAIL?

A FOUR OR FIVE YEARS.

Q WHAT KIND OF STUFF DID Y'ALL DO TOGETHER?

A MOSTLY SHOOT BASKETBALL, RIDE AROUND BECAUSE MY OLDER SON'S MOTHER IS FROM ROCK HILL AND I USED TO COME OVER A LOT AND SEE HIM WHEN I CAME TO [82] ROCK HILL WITH HIS COUSIN FREDDY.

Q DOWN THERE WHERE HIS FAMILY WAS IN ROCK HILL, THAT'S WHERE HE, BECAUSE THE VALLEY IS WHERE HIS DADDY LIVED. DID YOU KNOW HIS DADDY OTHER AS FAR AS GALILEAN ROAD OR DOWN THAT WAY?

A I'VE MET HIM, YEAH.

Q OKAY. SO YOU KNOW HIM. DID YOU KNOW HIM AT THE TIME TOO

A HIS DADDY?

Q YES, SIR.

A I'VE KNOWN HIS DADDY SINCE I'VE BEEN IN YORK.

Q SO YOU KNEW HIS PEOPLE UP HERE BECAUSE YOU KNEW HIM SINCE YOU WERE SEEING YOUR SON'S MOTHER DOWN IN ROCK HILL AND Y'ALL HANGING OUT DOWN THERE?

A AND WHEN HE COME UP TO VISIT.

Q SO BOTH PLACES?

A YEAH.

Q OKAY. FOR ABOUT FOUR OR FIVE YEARS?

A RIGHT.

* * *

[83] Q I GOT YOU. NOW IN '92, AFTER YOU HEARD JIMMY WHITE SAY THIS IN MARCH OF '92, WHO DID YOU TELL?

A WELL, AT THAT TIME I DIDN'T TELL ANYONE, YOU KNOW, BECAUSE SEE, I'M LIKE THIS, SOMETHING LIKE THAT YOU JUST DON'T GO GOSSIPING ABOUT OUT ON THE STREET BECAUSE IT'S GOING TO PUT YOUR LIFE IN DANGER, YOU KNOW, AND I KNOW HOW THE GUY IS, JIMMY, AND I DIDN'T WANT HIM TRYING TO COME UP BEHIND ME AND HIT ME IN THE BACK WITH A STICK OR A BOTTLE OR WHAT NOT.

Q NOW WHERE WERE YOU IN '93?

A '93 I WAS SENTENCED TO CENTRAL CORRECTIONAL INSTITUTION.

Q WHEN DID YOU GO DOWN IN '93?

A I WENT DOWN I GUESS ABOUT THIS TIME '93.

Q AND KIND OF FALL OF '93 END OF SUMMER '93?

A RIGHT.

Q SO WHEN BOBBY WAS GETTING TRIED BACK AT THE BEGINNING OF '93, DO YOU REMEMBER THAT?

A I REMEMBER WHEN HE WENT TO COURT BUT I WAS IN BALTIMORE, MARYLAND, BECAUSE MY FATHER, IF YOU LOOK IT UP, HE DIED FROM AN ILLNESS.

Q YES SIR, I'M SORRY.

A AND I WENT UP THERE TO SEE HIM. I DIDN'T GO ON [84] MY OWN. ONE OF MY AUNTS TOOK ME UP THERE TO SEE HIM. WHEN I COME BACK I THINK BOBBY HAD BEEN DONE TRIED OR BEEN SENT DOWN THE ROAD.

Q OKAY. HOW LONG DID YOU STAY UP THERE?

A I STAYED UP THERE ABOUT 7-8 MONTHS.

Q WHEN YOU GOT BACK AND HOW LONG WERE YOU BACK BEFORE YOU WENT DOWN TO CCI?

A I TELL YOU THE TRUTH, I CAN'T RECALL HOW LONG I WAS BACK BECAUSE THEY CAME AND PUT ME IN THE OLD BUILDING OUT DOWN BEHIND THE MOSS JUSTICE CENTER.

Q THE OLD CHAIN, USED TO BE UP ON THE HILL?

A THE OLD WHITE BUILDING BACK THERE. HAVE A LOT OF AUCTIONS AND STUFF OUT THERE NOW.

Q RIGHT. THEY DID THAT AFTER YOU CAME BACK?

A YEAH, I SAT THERE FOR AWHILE THEN THEY TOOK AND TRIED ME IN THE OLD COURT-HOUSE UP TOWN.

Q RIGHT.

A AND I NEVER SEEN THE STREETS AGAIN UNTIL NOVEMBER 1998.

Q I GOT YOU. SO ANY TIME BACK FROM THE TIME YOU HEARD THIS IN '92 EVEN AFTER YOU GOT BACK IN '93 AND YOU HEARD BOBBY HAD BEEN SENT DOWN THE ROAD, DID YOU TELL ANYBODY ABOUT IT?

A THAT HE HAD WENT DOWN THE ROAD?

[85] Q NO, THE THING ABOUT JIMMY WHITE?

A WELL, MY WIFE, YOU KNOW, I HAD ASKED HER WHAT DID SHE THINK ABOUT IT AND SHE TOLD ME TO FOLLOW MY HEART. YOU KNOW. SHE COULDN'T TELL ME WHAT TO DO AND SHE REALLY DIDN'T WANT TO HEAR YOU KNOW ANYTHING ABOUT IT. SHE DIDN'T WANT NOTHING TO DO WITH IT, YOU KNOW, SO I DID LIKE SHE SAID. I SAT DOWN THERE AND THOUGHT ABOUT IT FOR AWHILE. WHAT CAN YOU DO WHEN YOU ARE LOCKED UP?

Q WELL, YOU COULD HAVE TOLD SOMEBODY, COULDN'T YOU?

A IT WOULDN'T HAVE DONES NO GOOD.

Q IT WOULDN'T, OKAY. NOW HOW DID YOU END UP BEING HERE TODAY?

A HERE TODAY?

Q YES, SIR.

A WELL, I GOT A CALL FROM ONE OF HIS LAWYERS.

Q UH-HUH.

A AND I AGREED TO MEET AND TALK WITH THEM.

Q WHEN WAS THIS, DO YOU RECALL?

A IT WAS ABOUT 11, WELL, I MET WITH THEM ABOUT 11 O'CLOCK.

Q TODAY IS THE FIRST TIME YOU HEARD FROM THEM?

A WELL, THEY CALLED ME AT HOME. I GUESS IT WAS ABOUT BETWEEN NINE AND TEN LAST NIGHT.

* * *

[Ken Rhodes – Redirect]

[89] Q JUST ONE OTHER THING, WHEN YOU SAY THAT JIMMY TALKED ABOUT GOING TO SEE THE OLD LADY ON CALIFORNIA STREET, HE WASN'T TALKING ABOUT, HE WAS TALKING ABOUT A LADY WHO WAS OLDER, NOT ABOUT HIS GIRLFRIEND OR ANYTHING?

A NOT ABOUT A GIRLFRIEND BECAUSE HE DIDN'T, LIKE I SAY, I NEVER KNOWN HIM TO HAVE A GIRLFRIEND BUT WHEN HE DATES SOMEONE, YOU KNOW, THAT'S JUST LIKE I MEET A WOMAN OUT ON THE STREET, WE'RE NOT GOING TOGETHER OR WHAT NOT BUT WE GOT A RELATIONSHIP OR WE

MESS AROUND EVERY NOW AND THEN OR WHAT NOT, THAT'S WHAT I'M TALKING ABOUT.

Q LET ME CLEAR UP ONE MORE THING. ABOUT KILLING THE LADY, WHAT DID HE SAY ABOUT THAT? DID HE SAY THAT HE KILLED THE OLD LADY RIGHT THEN, WHAT DID HE SAY SPECIFICALLY ABOUT THAT?

A WELL, HE TOLD ME THAT HE DID HAVE SEX WITH THE LADY. HE SAID BUT THE LADY DIDN'T DIE. SHE WASN'T DEAD WHEN HE LEFT THE HOUSE. HE SAID SOMETHING ABOUT A HOSPITAL, SHE WAS IN A HOSPITAL AND SHE CAUGHT PNEUMONIA AND DIED THEN AND NOW THAT THEY DONE PUT A MURDER RAP ON BOBBY [90] THAT HE WAS GOING TO BURN FOR SOMETHING THAT HE DIDN'T REALLY DO.

Q "HE" BEING BOBBY?

A RIGHT.

Q OKAY.

A YOU KNOW, AND THAT HE FELT THAT IT WAS WRONG FOR THEM TO FRY SOMEONE THAT REALLY DIDN'T DO IT AND I TOLD HIM, I SAID THEN, WHY DON'T YOU CONFESS.

Q WHAT DID HE SAY?

A YOU MUST BE CRAZ.. I MEAN HE SAY I WAS CRAZY YOU KNOW. WHAT ELSE COULD I SAY TO SOMEBODY LIKE THAT.

Q THANK YOU, KEN.

RECROSS EXAMINATION BY MR. POPE:

Q SO MR. RHODES, WE'RE GOING AROUND AND AROUND ABOUT WORDS I THINK. LET ME MAKE SURE. JIMMY TALKED ABOUT SEEING HIS OLD LADY OVER ON PECAN OR CALIFORNIA OR WHATEVER, YOU DON'T KNOW IF THERE IS AN OLD WOMAN OR A YOUNG WOMAN, BUT YOU KNOW JIMMY, FROM EVERYTHING YOU KNEW OR EVERYTHING YOU SAW, HE ONLY RAN WITH OLDER WOMEN?

A RIGHT, OLDER WOMEN.

* * *

STATE OF SOUTH CAROLINA COUNTY OF YORK	) IN THE COURT OF GENERAL SESSIONS SIXTEENTH JUDICIAL CIRCUIT #90-GS-46-1196, 1197, 1198, 120C
STATE OF SOUTH CAROLINA, PLAINTIFF, v. BOBBY LEE HOLMES, DEFENDANT	ORDER RE: THIRD PARTY GUILT EVIDENCE

Defendant seeks admission of evidence he claims tends to prove another guilty of the murder of Mary Stewart for which he is charged in the above set forth indictments. Defendant has presented on this issue testimony by a number of witnesses he claims bring this proffered evidence within the guidelines of the *State v. Gregory*, 198 S.C. 98, 16 S.E. 2d 532 (S. Ct. 1941).

In *Gregory* our Supreme Court established the criteria for admission of third party guilt evidence. *Gregory* sets forth this rule as follows:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a

> conjectural inference as to the commission of the crime by another, is not admissible . . . But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends to clearly point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by financiful analogy to say to the jury that someone other than he is more probably guilty. (16 S.E.2d at 534)

The defendant's witnesses establish to the Court's satisfaction that sufficient evidence exists from which a jury may conclude a third party, Jimmy McCaw White was in the proximity of Mary Stewart's home near the time the State asserts she was beaten and raped. See testimony of Renata Jamison, Neshelly Gilmore and Delores Brown. (The Court finds Annie Boyd's testimony insufficient to place Jimmy McCaw White in the area at the time).

The defendant presented Joshua Lytle to rebut Jimmy McCaw White's testimony that he rode to Sharon with Lytle hours prior to the purported time of the beating and rape. The Court finds this evidence supports the testimony of the three "proximity" witnesses set forth above. Additional, it shows that Jimmy McCaw White's testimony is subject to impeachment on this issue (i.e. his being at

home in Sharon at the time of the crime) if he were to be called as a witness at trial.

The defendant presented testimony by John Dixon and Nancy Bennett, which does not amount to a confession by Jimmy McCaw White as the party guilty of the murder of Mary Stewart. The testimony of Thomas Murray, Steven Westbrook, Mattie Mae Scott and Ken Rhodes do rise to the level of testimony from which one could conclude Jimmy McCaw White has admitted in the presence of these witnesses that he beat and raped Mary Stewart.

Defendant presented a theory on motive for Jimmy McCaw White being the guilty party, that motive being his "fixation" with "older women". The testimony does not rise to the level to establish this as a propensity of Jimmy McCaw White with the possible exception of Ken Rhodes' testimony, which marginally could be taken as evidence of a penchant for older women by Jimmy McCaw White.

Jimmy McCaw White testified he did not commit the crime Defendant is charged with in the above set forth indictment.

At first blush, the above arguably rises to the *Gregory* standard. However, the "engine that drives the train" in this *Gregory*, analysis is the "confessions" by Jimmy McCaw White. Such "confessions" are, of course, hearsay. In order for Mr. Holmes to put the engine on the track, these hearsay "confessions" must be admissible as declarations against penal interest under rule 804(b)(3), South Carolina Rules of Evidence. Admissions under this Rule when offered to exculpate an accused, must be corroborated by evidence clearly indicating the trustworthiness of the statement. *State v. Kinloch*, 338 S.C. 385, 526 S.E.2d 705 (Sup. Ct. 2000), *State v. Forney*, 321 S.C. 353, 468

S.E. 2d 641 (Sup. Ct. 1996) and *State v. Doctor*, 306 S.C. 527, 413 S.E. 2d 36 (Sup. Ct. 1992).

Here, Defendant bears a "formidable burden" in meeting the Rule's requirements (*Kinloch*, 526 S.E. 2d 706) and Defendant's presentation does not meet this burden. Thus the train's engine is not on track and the train cannot travel into and through this case. The evidence here presented pales in comparison to that excluded in *Forney*, and in *Forney* the declarant was in fact a co-defendant and Forney testified as to the witness being present at the shooting of Officer McCants and named his co-defendant as the triggerman (468 S.E. 2d at 644). The evidence presented by Defendant falls woefully short of that in *Doctor*. In *Doctor* all three minor defendants had related identical versions of the crime and three witnesses saw the stolen car be occupied by the witnesses whose statements against penal interest were offered without Doctor in the car.

Here, as in *Forney*, there is no independent evidence corroborating Jimmy McCaw White's alleged statements that he committed the beating and rape of Mary Stewart. As the Supreme Court observed in reference to *Forney*, in the Court's opinion, in *Kinloch*, for the statements to rise to the level of trustworthiness, there should be "independent evidence corroborating the *declarant's* claim" (Emphases added, 526 S.E. 2d at 707). Additionally, at the time of the alleged statement in the presence of Mattie Mae Scott, Jimmy McCaw White was, according to her, "intoxicated." (See *Kinloch* regarding statements by those under the influence of drugs).

None of the proffered testimony contains evidence, absent the statement itself, which would link Jimmy

McCaw White to the crime other than information that from all the testimony appears to have been common knowledge, i.e. an "old woman" had been beaten and raped in the early rooming hours and that Defendant had been tried, convicted and sentenced to death for the crime. None of Jimmy McCaw White's statement contain details of the crime and no forensic evidence has been offered linking Jimmy McCaw White to the crime. White's alleged statements are general in nature and his presence in the general area during the time period in which the crime is alleged to have occurred, does not corroborate his alleged "confessions".

Exclusion of the alleged statements of Jimmy McCaw White, will leave not only the engine missing from the train, but results in there be absolutely no facts or circumstances which clearly point to Mr. White or anyone else as the person guilty of the beating and rape of Mary Stewart. This being the case, the *Gregory* analysis ends here and Defendant's motion to present evidence of Third Party is DENIED.[1]

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[1] Defendant argues in his brief that Jimmy McCaw White's statements may be used to impeach his testimony. As to how Mr. White would even be on the stand in this trial is only by convolution addressed in Defendant's brief. Impeachment of any witness will be a matter to be dealt with at trial. (Save the Court's prior rulings regarding Defendant's prior record). If Mr. White does have relevant testimony such as to be a witness at trial, the issue of impeachment is deferred to that time should it occur.

IT IS SO ORDERED.

/s/ John C. Hayes, III
John C. Hayes, III
Presiding Judge

August 23, 2000
York, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF YORK	) IN THE COURT OF GENERAL SESSIONS
THE STATE -vs- BOBBY LEE HOLMES, Defendant.	) TRANSCRIPT OF RECORD) 90-GS-46-1196) 90-GS-46-1197) 90-GS-46-1198) 90-GS-46-1200) MARCH 17, 2001) YORK, SOUTH CAROLINA

VOLUME VI

BEFORE:

HONORABLE JOHN C. HAYES, III, JUDGE; and a Jury.

APPEARANCES:

THOMAS E. POPE, SOLICITOR
WALTER WILLIAM THOMPSON,
ASSISTANT SOLICITOR
KEVIN BRACKETT, ASSISTANT SOLICITOR
E.B. SPRINGS, IV, ESQUIRE
Attorneys for the State.

WILLIAM N. NETTLES, ESQUIRE
JAMES M. MORTON, ESQUIRE
MARK J. MACDOUGALL, ESQUIRE
JONATHAN M. KRELL, ESQUIRE
JEFFREY BLOOM, ESQUIRE
Attorneys for the Defendant.

* * *

[2016] THE COURT: All right. Is the State ready to proceed on the – I think the first issue, because it may arise today before we draw the jury, it has nothing to

do with the jury, is the issue concerning the – for lack of a better word, those multiple issues that fall under the category third-party guilt.

Of course, the court has earlier ruled that the defense would not be able to utilize a defense of third-party guilt, particularly the guilt of one Jimmy McCaw White. I have issued a written order on that. A motion to reconsider has been issued – has been filed.

At this point I am not convinced to change my earlier ruling as to the third-party guilt issue. Under the case law, the third-party guilt must point I'm using my words. I don't have my case in front of me, but point to the third party and arise above suspicion and exonerate, for lack of a better word, the person who is charged. I don't – I may have to revisit this after I hear the State's case, and that would be the point which the defense would want to present that evidence anyway. But at this point I'm going to stick by my earlier ruling.

* * *

[2023] THE COURT: Again – let me finish. I know I'm going very slow, and like some of these jurors, I'm being somewhat pensive.

And I guess, though, again I'm at that point as to the third-party guilt. I don't know that I can account for where I was that night, and that doesn't necessarily mean that I was in this neighborhood or committed this crime. I haven't confessed to it, as Mr. White supposedly has, but there were literally, I would think, dozens. I'm not going to go so far to say hundreds of people. I mean obviously, they have – not obviously, and I hate to make a leap, although I think it's intellectually honest that people lived in those

other apartments and there were people that – there were more people than Jimmy McCaw White that had access to Mary Stewart's house at that time of the morning on that day. The [2024] fact he had access to it and was there does not point away from Mr. Holmes guilt.

Confessions do bother me, although they, in and of themselves, him simply making those statements, they don't completely point away from Mr. Holmes guilt, but they, at least, perhaps rise to the level of raising some question about it. All right.

* * *

[2028] THE COURT: But then, again, the defense, while maybe not entitled to present that as a defense, certainly would appear to have the right to develop the extent of the investigation.

* * *

[State's Witness Maggie Berniece Thrasher –
Direct By Mr. Thompson]

[2148] Q * * * Did you get to talk to her?

A Yeah, shortly after that, then she called me back. And "this is Ms. Stewart." And I said – she was so upset, she just all to pieces, I say. And she said "I'm in trouble over here." I said "in trouble. What happened." She said "I have been beat up and I have been raped." That's what she told me. She did. I asked her.

* * *

[2150] A Well, when she talked to me she said it just had happened. He just had went out the door. Didn't tell

me exactly what time he come in, but at 7:45 she said he just had gone out the door.

Q And can you tell me, did she give any description of him at all, that you recall?

A Yes, she said it was a dark chunky fellow.

Q All right?

A Was kind of short, dark skinned fellow, chunky wide.

* * *

[2153] Q So the $40.00 was the amount that she said was taken?

A Yeah.

* * *

Q Can you tell us why you ended up calling Alaine Byers?

A Well, Alaine Byers had a key to Mrs. Stewart's apartment.

Q Uh-huh.

A And I didn't have no car home that morning to [2154] get over there, but I knew Mrs. Byers had a key to Mrs. Stewart's apartment and I knew Mrs. Byers had a car. And that's why I called Mrs. Byers to go over.

* * *

[State's Witness Alaine Byers – Direct By Mr. Thompson]

[2163] A It was between 7:30 and eight o'clock, somewhere in there.

Q Okay. And when you got that call, what did you do?

A Well, I put down everything that I was doing and went over there.

Q Okay. And how far is her house from yours?

A About a quarter of a mile.

Q So about how long, altogether, from the time that you got the call did it take you to get over to her house?

A Within five to ten minutes.

Q And when you got there, how did you get in?

A I had a key, because she had broken her hip prior to that. And she gave me a key in case she needed me, I could get in.

* * *

[2165] Q Now, when you came in, where was Mary Stewart?

A I did not see her when I went in, but I called to her. She answered and I went down the hall, turned to the left and she was sitting on the right-hand side of the door in her bedroom.

* * *

[2166] A Yes, I did. When I went in and when I saw her, I asked her, "Ms. Stewart, who in the world did this to you?"

Q And what did she say?

A She said that "I don't know who it was. It was my fault. I opened the door."

Now, do you want me to tell you the truth of what she said to me?

Q Yes, please, ma'am. If you remember the words she said, I would ask that you speak them to us today.

[2167] A She said "I don't know who he was. All I know is he was big and dark." Those are her words and God as my witness.

* * *

[State's Witness Officer Dale Edwards –
Direct By Mr. Pope]

[2182] Q Officer Edwards, if you could, tell the jury what happened when you arrived on the scene, who you met at the door and what you did.

A I was met at the door by Ms. Byers that had come up to the police department earlier. She led me back to where Ms. Stewart was sitting in the bedroom.

Ms. Stewart was sitting in a chair inside the bedroom. And I asked her what had happened and she gave me a set of facts that earlier that morning, around 6:00 or 6:30, she had heard a knocking at the door, and she went to answer the door, and at which time a black male forced his way in. And in the process, he was beating her about the head and chest and pushed her back into the bedroom, at which time he tore her nightgown off and began to rape her. She said that he couldn't have vaginal sex with her, [2183] so he began to have anal sex with her because she was too small.

She said that the whole time he was beating her about the head and chest and ripped her nightgown off, she said something about, "you know, just take my money, take my

$40.00," at which time he went to the pocketbook and removed the $40.00 and left.

* * *

[2184] Q Okay. Could you take a look and just confirm and tell me what State's Exhibit No. 2 is?

A It appears to be the bed clothing that was removed from Ms. Stewart's bed that day by me and Lieutenant Barnett.

Q And you got that from Ms. Stewart's bed?

A Yes, sir, we did.

Q Okay. Now, in this container, this newer bag that's also torn, there is another bag in the bottom that has a No. 2 on it, doesn't it? You have looked at that previously also?

A Yes, sir, I have.

Q Okay. And so at the time that you recovered it, what did you place these items in?

A A plastic – a paper bag that come out of the kitchen.

Q So as far as the plastic bags that I have them separated into, you did not put them into these –

A No, sir.

Q – items. Okay.

MR. POPE: Your Honor, I would move State's Exhibit No. 2 into evidence.

* * *

[2186] Q Okay. Finally, I would show you what would be identified as State's Exhibit 4 for identification. And I know you have previously had an opportunity. Again I would ask you to look at this item.

(Pink Paper Towel marked as State's Exhibit No. 4 for identification)

A Yes, sir, this is the paper towel that Ms. Stewart had given me personally.

Q Okay. And did she indicate what the significance of this paper towel was?

A It had blood on it.

Q Okay.

* * *

[Officer Dale Edwards – Cross By Mr. Morton]

[2201] Q You began to gather evidence at the scene?

A Yes, sir.

Q You went into the bathroom and got the night-gown that she had been wearing?

A That's correct.

Q That she had placed in the bathroom?

A That's correct.

Q There was also a bathrobe in there of some kind, or some shoes?

A I don't remember any shoes.

Q Okay. You got a bath – I believe you got a bath – a nightgown, a bathrobe, and some bedroom shoes from the bathroom. Do you remember that?

A I don't remember the bathroom shoes, but, you know, if it's on the evidence report, then I got them.

Q Okay. In any event, you got a nightgown and a bathrobe, and for lack of anything better to put it in, you got a paper bag from her home?

A That's correct.

Q Just a regular old paper bag, like we all get from the grocery store?

[2202] A That's correct.

Q You didn't put it in one of these – didn't put it in one of these plastic bags. I know it's in there now, but when you got it, you just picked it up and put it in the –

A In the grocery bag, yes.

Q In the grocery bag.

And that was the nightgown that she was wearing and a bathrobe?

A Yes, sir.

Q You didn't notice any blood on the nightgown at that point?

A I did not look. She said she was wearing that. I grabbed it and put it in the bag.

Q Okay. You did notice blood on a paper towel, I believe?

A Yes, sir.

Q Okay. And you put that in a separate bag?

A Yes, sir.

Q Okay. Now, you weren't – you didn't have any gloves on, or anything like that?

A No, sir.

Q That was – back then you just – you all didn't wear gloves when you went to crime scenes?

A No, sir.

* * *

[Officer Dale Edwards – Redirect By Mr. Pope]

[2215] Q All the clothes that she had said that she had been wearing when this assault happened, they were just in a pile in the bathroom, and you just scooped them up with your bare hands and put them all together in a paper bag?

A That's correct.

* * *

[2219] Q You were trying to explain to Mr. Morton about the information concerning the hair length, and I think there was a clothing description too, is that correct?

A Yes, sir, there was.

Q Okay. And what was the clothing description?

A She stated that subject had on either a black or blue jacket.

* * *

[2235] this was her statement.

A Six a.m. and seven a.m. A male in his late twenties knocked on the front door of her home at 224 California Street. She opened the door and the man pushed his way into the home. He beat her about the face and body, knocking her down. Attempted to penetrate the vagina with his penis. Was unable to do so. Then penetrated her anus.

Q All right. Now, after getting that information from her – let's see if we can go down this, so the jury will have this, if you can just tell me a little bit about the description of the assailant, if she gave one at that point?

A The number of assailants was one. Late twenties. Black. He was a stranger.

* * *

[2236] Now, as you go through the next part of the form, it talks about the – I guess the actual examination of the lower body. Was that actually done at that point in time?

A No, because –

Q Why is that?

A Because of her complaint of hip pain.

Q Okay.

A And we were – the doctor wanted to wait for x-rays.

Q Okay. So you needed to take x-rays before you would move her, basically her pelvic region?

A Right.

* * *

[2238] Q And can you tell me on the last page, I believe it shows the time in which the kit was – or this was – this part of this was finished. And do you have – can you tell me what time it was when you finished that up?

A 11:15.

Q I'm sorry, where do you see that on the form?

A Oh, wait a minute. The next thing I have with the time is that she – you know, that was when we had the change of the mental – mental status change.

Q Mental status change?

A Where she became confused.

Q Okay.

A Did not recognize anyone any longer.

Q Okay.

A And that was when everything ceased, so that she could be transferred to Piedmont Medical Center at that time.

Q So you didn't ultimately do an exam of her vagina or her anus at that time?

[2239] A No, sir.

Q And you are saying that's due to her mental condition changing at that point?

A Right.

Q Okay. And that's what that 11:15 is?

A I think – Dr. Gwinn up at P.M.C., that was where we were transferring her to at 11:15.

Q Okay. And now if you would look at the last page, the one which you have signed it there, next to the date?

A Uh-huh.

Q What is the time on that?

A That's 9:50.

Q Would that be the time that you completed the kit itself?

A My part, yes.

Q Your part of the kit.

And what did you do with the kit ultimately?

A It was turned over to James Smith.

Q And who was he?

A He was a police officer.

Q A police officer?

A Police officer.

Q With the York Police Department?

A Yes.

[2240] Q And what time do you have it listed that that was turned over to him?

A Two o'clock.

Q And was it sealed at the time that you turned it over to him?

A Yes.

Q And can you tell me – you had mentioned mental changes. Can you tell me what you noticed at that time, noticed in mental changes?

A When she first came in she was alert, oriented, responsive. She knew who she was, where she was, what time of day it was.

Her son arrived. She knew him.

Then the mental – okay, I'm not allowed to diagnose, but she had mental – pressure was building up, I presume, and she didn't know who she was. She became confused. She didn't know her son any longer.

Q Okay. And that was right around the 11:15, is why she was ordered –

A Right, when we were getting ready to transfer.

Q Where were you going to transport her at that time?

A To Piedmont Medical Center.

* * *

[Carol Cole – Cross By Mr. MacDougall]

[2244] Q Ms. Stewart, on Form 4, which I think goes onto Form 5, page four and page five, when you testified to Mr. Thompson, you described the protocol generally as taking fingernail scrapings, blood, semen samples, and so forth. But, in fact, with Ms. Stewart you took no fingernail debris scrapings at all?

A I did not record it, so I don't believe I did.

[2245] Q Okay. And you took no semen samples or no semen debris?

A We could not do the vaginal due to – well, first of all, she was complaining – she complained when we moved her hips. And in order to take that kind of specimen, you have to be able to separate the hips. So we could not do that. We wanted x-rays to make sure there was nothing broken before we, you know, attempted that.

Q Okay. So the only thing you took was the blood samples?

A Basically, yes.

* * *

[2250] Q So, in fact, this rape kit had expired eight months earlier, is that right?

A Yes, according to this.

Q According to that. And so it shouldn't have been used, should it?

A Probably not.

* * *

[State's Witness Dr. Todd Gwinn –
Direct By Mr. Thompson]

[2260] A At – let's see, at eleven o'clock the patient had a sudden acute change in mental status, meaning that she began to speak in garbled speech, appeared confused. So her neurologic exam had changed. The remaining neurologic signs were unchanged. There was nc focal weakness, etcetera. But in view of the bruises on her head

and the changes in the mental [2261] status, that was enough of an indication to recommend an emergent CAT scan and look for bleeding inside the brain.

* * *

[State's Witness Dr. John W. Macey, Jr. –
Direct By Mr. Thompson]

[2282] Q And if you would, tell me were you practicing medicine in December of 1989?

A Yes, I was a resident in training at Charlotte Memorial Hospital & Medical Center.

Q And as a resident in training there, did you have an occasion on December 31st of 1989 to come in contact with Mary Stewart?

A Yes, I was called to the recovery room to perform a rape exam on this patient.

Q All right. And this is at which hospital again?

A Charlotte Memorial.

Q Memorial Hospital?

A This is now called Carolinas Medical Center.

Q Okay. And did you perform a rape kit on her at that time?

A Yes, I did.

* * *

[2284] Q Look at State's Exhibit No. 8. if you could look at that and tell me what was collected at that time?

A The patient's clothing, pubic hair combings, vaginal smears and swabs, anal smears and swabs, saliva samples, blood samples, head hair and pubic hair.

Q Okay. And, in fact, does it give an instruction at the top of that page as to what would be done with those when they are collected?

A Yes, it does.

Q What does that say?

A It says "follow the instructions found in North Carolina sexual assault evidence collection kit. Clearly identify date, initial, and seal all containers. Check off items that are collected."

Q All right. And did you do that? Did you seal all containers?

A Yes, I did.

Q And what ultimately did you do with the kit at [2285] that point in time?

A I handed it personally to Scott Johnson, detective, City of York Police Department.

Q Now, according to that, you would have given both the rape kit and the clothing to the officer?

A That's correct.

Q Okay. Thank you.

* * *

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF
COUNTY OF YOR	)	GENERAL SESSIONS
THE STATE	)	TRANSCRIPT OF RECORD
	)	90-GS-46-1196
-vs-	)	90-GS-46-1197
	)	90-GS-46-1198
BOBBY LEE HOLMES,	)	90-GS-46-1200
	)	MARCH 17, 2001
Defendant.	)	YORK, SOUTH CAROLINA

VOLUME VII

BEFORE:

HONORABLE JOHN C. HAYES, III, JUDGE; and a Jury.

APPEARANCES:

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WALTER WILLIAM THOMPSON,
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* * *

[State's Witness Officer Wilson Barnett –
Direct By Mr. Pope]

[2325] Q Did you have an opportunity to respond to Ms. Stewart's residence, at 224 California Street?

A Yes, I did.

Q And could you tell the jury, do you recall [2326] approximately what time that you arrived?

A Between 8:00 and 8:15.

* * *

[2329] Okay. At that point, or some point there, did you have a chance to leave and go up to the hospital and speak to her again?

A Yes, after I had gotten – the scene was secure and everything, I left and went to the hospital.

Q And did you have an opportunity in talking to her to record her statement?

A Yes, I did.

Q And this was right after you left the house and had gone up the hill?

A Right.

Q Okay. And have you reviewed a copy that – we have a copy of that tape?

A Yes, I have.

* * *

[Officer Wilson Barnett – Cross By Mr. Nettles]

[2334] Q Did you ever touch the sheets?

A Yes, when we took them off the bed.

Q Right. And you did not have on gloves?

A No, I did not have on gloves.

Q You took the sheets off the bed, and the sheets [2335] were not placed in plastic bags?

A When we took the sheets off the bed, we folded them up and Officer Edwards took them out into the other room.

Q Okay. Took them out into the other room and put them on the table, the dining room table?

A Where he put them, I don't know. I was in the room with Ms. Stewart.

Q Did you have – was your – was your gathering of the sheets limited to taking them off the bed?

A And folding them up.

Q And folding them up.

A Helping to fold them up.

Q Helped to fold them up. Did you fold them up like the two of you?

A Yes, we folded them.

Q So y'all were, you know, doing like you kind of do, folding up blankets when two people do it?

A Yes, that's the way we did it.

Q You did that with the bottom sheet and the top sheet?

A Yes.

* * *

[2340] Q Okay. Now, when you discussed with Ms. Stewart – you actually discussed that with her during the statement that you took from her?

A What is that?

Q Well, you said "tell me things he touched."

A I said "tell me what he did."

Q "Tell me what he did."

A If I recall it.

Q All right. Well, she at least – well, at one point she said "there were plenty of things he touched?"

A Yes, she told me he touched the telephone, he touched the pocketbook, he touched the door.

* * *

[2346] Let's talk for a second about your conversation with Ms. Stewart, if we may.

A Okay.

* * *

[2350] Q As a matter of fact, she described the hair as "the hair was kind of long. Not too long, but a little longer than you usually wear it."

[2351] A Then who usually wear it?

Q That's what she said. Than you usually wear it.

A Than you usually wear it.

Q That's right.

* * *

[2352] Q Now, she asked you – as a matter of fact, she said "he was middle aged. He was young. He was not too young. And he, as I remember, his hair was not short or not too long."

A She kept me off balance. When she made the statements like that, I couldn't figure out where she was going. Whether she was going or coming, I didn't know. Not too long. Too short. Not old. Not young.

* * *

[2353] Q Okay. There was never a picture of Bobby Holmes shown to Ms. Stewart?

A I don't know.

Q Okay. You never showed a picture to Ms. Stewart?

A No, I did not.

Q There was not a photo lineup of Bobby Holmes shown to Ms. Stewart?

A I don't know.

Q You never showed a photo lineup?

A I didn't.

* * *

[Officer Wilson Barnett –
Redirect By Mr. Pope]

[2357] Q Okay. She didn't say maybe he had on a jacket, maybe he did not have on a jacket. She said he had on a jacket?

A No, he had a jacket.

Q And you asked her the color or type, and she said "this was a dark jacket, must have blue or black, must have been black, because," she said, "you see, I don't see too well, you know, without my glasses."

A Uh-huh.

* * *

[State's Witness Officer Scott Johnson –
Cross By Mr. Nettles]

[2376] Q Okay. Now, Deputy Johnson, you were called to the scene of this assault on December 31st of 1989?

A Yes, sir.

Q And you were called there in your capacity as a K-9 officer?

A Yes.

Q Correct. And in your capacity as a K-9 [2377] officer, you brought the dog, right?

A Yes, I did.

Q And that was a bloodhound?

A Yes.

Q And you went to the scene on California Street?

A Yes.

Q And there you put the dog on a scent, correct?

A Well, we look for a scent. We don't just put it on. It's not an visible so –

Q Well, let's –

A We were looking for a scent.

Q Let's sort of cut to the chase.

A Okay.

Q The dog goes and you follow the dog, right?

A That's correct.

Q And that dog led you to a tank top on Pecan Circle, correct?

A That's right.

Q And then you – the dog sort of recognized some significance to the tank top, correct?

A Yes, sir.

Q And so as the result of the significance that the dog gave to the tank top, you picked up the tank top, correct?

A That's right.

* * *

[2382] Q Okay. You found the blue tank top – you and the dog found the blue tank top on Pecan Circle?

[2383] A In the area, yes.

Q In the area of Pecan Circle?

A That's right.

Q That is what, twenty-five, a hundred yards away from California – from where the incident happened?

A It would be. Yeah, it would be close.

Q Twenty-five, or a hundred, or do you even know?

A It's not – it's somewhere in that vicinity, yeah. That close.

Q Can you tell me, if we were all to get in the car, could you take us to where you found the blue tank top?

A I don't know if I could or not. It's been a long time.

Q Okay. Can you get any more specific about the location of the blue tank top that you and the dog found, other than in the Pecan Circle area?

A I just remember it was on what we refer to in the south as a pig path. It would be a beaten path.

* * *

[State's Witness Officer Grady Harper –
Direct By Mr. Pope]

[2394] Q Could you tell the jury where the Cannon Court Apartments are located?

A Cannon Court Apartments is located right down below Blackburn Street on Ross Cannon.

Q Okay. That's here in York?

A Back to the left.

Q Okay. In that early morning hours of December 31st, did you receive a call to respond to Cannon Court Apartments, back in 1989?

A I did.

Q Okay. Do you recall approximately what time that you received the call?

A Around four something. If I had the log, I could remember. That's been a good while back.

Q You say log, what are you referring to?

A The radio log.

Q Okay. Would the radio log assist you in refreshing your memory?

A It would.

Q If you could, Officer Harper, if you can look at that and tell me when you were dispatched to Cannon Court?

A Around about 4:43.

* * *

[2395] If you would describe for the jury what you observed when you got there at Cannon Court?

A I went into the apartment over to the left of Cannon Court, which the older people lived in, and it was a disturbance going on there.

Q When you say disturbance going on, where was the disturbance taking place? And I'm not asking you about address as much as I'm asking about general area.

A It was at Cannon Court Apartments.

Q Inside or outside?

A They was everywhere around. It was bunch of them that was causing a disturbance.

Q Okay. And what did you do at that point?

A I told them they was going to have to quieten it down.

Q Okay. And did you know Bobby Holmes before this night?

A I did.

[2396] Q And did you see him that evening at Cannon Court?

A I did.

Q Okay. And did you – and is this the young man sitting over here in the white?

A That's right.

Q After seeing him that evening, did you have an opportunity to have a discussion with Mr. Holmes?

A I did.

Q Okay. And once you had a conversation with Mr. Holmes, what did you do next?

A I told Mr. Holmes and the rest of them there that they were going to have to quieten it down and move on.

Q Once – I didn't mean to interrupt you, but once you spoke to Mr. Holmes – I don't want to get into the substance of what was said, but once you spoke to Mr. Holmes, what did you do?

A Once I spoke to Mr. Holmes?

Q Yes, sir.

A I actually was talking to the whole bunch there. Mr. Holmes told me that – I said "you are going to have to move on." And he said "you are –

Q Let's don't get into what Mr. Holmes said. I apologize for keep interrupting you.

[2397] Did you have the opportunity to call the other officers to come to the scene?

A I did.

Q Okay. So did you have to go back to your car to do that?

A I did.

Q And once the other officer arrived, then what did you do?

A I told him what was going on and that Mr. Holmes was a little bit unruly and wouldn't listen to nothing I had to tell him and it looked like we was going to have to put him in jail for not leaving there, the disturbance, and everything. I wasn't wanting to have to put him in jail, but, you know.

Q But at that point you made the determination that you were going to arrest Mr. Holmes, is that correct?

A That's correct.

Q Okay. And what did he do?

A Well, they was having – it was just a disturbance going on there.

Q I'm not talking about that gave you cause to arrest him. I'm trying to avoid that part of it. What did you do – what did he do when you attempted to arrest him?

[2398] A He ran.

Q Okay. And what did the other officers do?

A They give chase.

Q Okay. Once they got – were they able to catch him at that time?

A No, they wasn't.

Q Okay. And once they came back, what did you do then? Once they came back – the officers came back, Mr. Holmes was gone, what did you do then?

A Well, Mr. Holmes and the crowd dispersed from there. They all was leaving. So I took my patrol car and went up the street to the maintenance building and sat and watched for Mr. Holmes to come back.

Q Okay. The maintenance building, where is that in relation to Cannon Court?

A Just right up above it.

Q So you kind or went up there and parked and just kind of watched?

A On the same side of the street.

Q You just watched and waited?

A That's right.

(Photograph marked as State's Exhibit No. 11 for identification)

Q I'll show you what's been marked as State's [2399] Exhibit 11 for identification and ask you if you can take a look at that. You previously had a chance to look at that?

A I have.

Q And what does that picture depict?

A Ross Cannon, Cannon Court and First Street, and Central Baptist Church.

Q Okay. And the way that you are looking, where was the – where you were set up for surveillance, where would that be in relation?

A It was right up above there at the grill. Up above the grill, at the maintenance place.

Q So State's Exhibit 11, would that accurately reflect what you were seeing in that direction?

A That's correct.

Q Okay. And the small road that is coming in here, what?

A That's Cannon Court into the apartments.

Q Okay.

MR. POPE: Your Honor, I would move State's Exhibit 11 for identification into evidence.

MR. MORTON: Without objection, Your Honor.

THE COURT: All right. Without objection, it's received into evidence.

Q Officer Harper, can you see that?

[2400] THE COURT: If you need to step down, you certainly can.

(witness off the witness stand)

Q Officer, if you would, first tell the jury – you again said in this configuration, this would be the view that you

would be taking for Cannon Court – I mean from where you set up, is that correct?

A That's correct.

Q Could you tell the jury what this road is here?

A That's the street end of Cannon Court Apartments.

Q So what would be over in this area?

A Cannon Court Apartments.

Q Okay. And could you tell the jury what this is right here?

A That's Central Baptist Church.

Q Okay. And right in here is –

A First Street.

Q Okay. All right. You can have a seat, sir.

(witness back on the witness stand)

Q Okay. Once you set up – I keep saying surveillance. When you set up there and started watching, did you ever see Mr. Holmes again?

A Yeah, I did.

Q And could you tell the jury what you saw and [2401] what he was doing at that point?

A He came back out and Mr. Digsby picked him up.

Q And where did you see him pick him up at?

A Right there at Ross – at Ross Cannon and where you turn into the Cannon Court.

Q Okay. So the road that you had indicated went into Cannon Court, you were looking and saw him right there?

A That's correct.

Q And what did you do at that point?

A I – they came out and they turned to the left going down Ross Cannon. And I went down and I turned my blue lights on. And they went into First Street at Central Baptist Church and they jumped out of the car, left it running, and run into a bunch of hedge bushes and just sat there.

Q So in this picture that we have been referring to, that's the church that you referring to?

A That's correct.

Q Okay. And the road, First Street is right on the other side of that church, is that correct?

A That's correct.

Q Okay. And you were behind them and they turned into that – into that road and into a yard?

A That's correct.

[2402] Q Okay. What, if anything, did you see? What did you see Mr. Holmes, if anything, do at that time?

A Mr. Holmes jumped out of the car.

Q And where did he go?

A Behind Central Baptist Church.

Q And that's again the church that we are referring to?

A That's correct.

Q Okay. Let me ask you this. When you saw him get out of the car, how did you know that was Mr. Holmes?

A I know Mr. Holmes.

Q And did you have the opportunity to see them then?

A I did.

Q And did you notify – your supporting officers, did you notify them that Mr. Holmes –

A I did, as soon as I seen the car picked him up.

Q Okay. And what happened to the driver, Mr. Digsby, in that car? What did you do with him?

A I arrested him.

Q Okay. Now, did you give chase to Mr. Holmes behind the church?

A I couldn't, because I had a car sitting there [2403] running in gear and had a prisoner already. I mean, you know.

Q All right. So you saw him initially up at the apartments. Then you see him get in the car and you follow him to behind the church, is that correct?

A I did.

Q Once he runs and goes behind the church, do you see him again?

A I did.

Q Okay. And could you tell the jury when you saw him again?

A I had got the prisoner situated and the car knocked out of gear and I seen Mr. Holmes talking to my fellow officers.

Q Now, could you tell the jury, looking at the picture, of where you would have seen Mr. Holmes talking to them?

A It would have been around on – it's speculating. Around on First Street, to your left the second – the third house down, I believe, it was the hedgerow.

Q That's where –

A Off the left-hand side. That's where they jumped from.

* * *

[Officer Grady Harper – Cross By Mr. Morton]

[2406] Q Now, when Mr. Holmes ran from you, several other people ran as well, right? He wasn't the only one that ran. There were a couple other guys that also ran when you came pulling up, right, or after you were there?

A That was – it was – it was people leaving from there, but I didn't – I didn't see no one but Mr. Holmes when he got in Mr. Digsby's car.

Q Now, I'm not – I'm not – I'm not talking about that. I'm talking about when you first got down there and he first you say ran and jumped over the wall. In other words –

A He didn't – he didn't run until I had my other men come down.

Q Okay. But other people ran too, right? There were a couple other guys that were also running?

A They were leaving, like I asked them to do.

Q Okay. And that's what Bobby Holmes was doing. He just ran, right?

[2407] A After a few choice words.

* * *

[2409] Q Okay. And all this was going on, Mr. Holmes was running away from downtown, right? That would be away from California Street?

A That would have been right, but I don't know where he went from there, because I didn't see him.

Q But when you saw him running from the officers that third time, he was running away from California Street?

A He was running parallel behind the houses on Ross Cannon Street.

Q Okay. Which is away from California Street?

A That's right.

* * *

[Officer Richard J. McCarter – Direct By Mr. Pope]

[2421] Q What did you determine concerning Mr. Holmes?

A The lieutenant advised us that he had ran behind the church, which is First Street. As you see the church, First Street is just on the other side of it. And he had ran back behind the church, which would be this way behind the church.

Q Okay. Could you tell the jury what you and Officer Driggers did then?

A We got in the car – after he got him handcuffed, we got in the car and came out beside the church right there to Ross Cannon and turned to come back toward the Cannon complex.

Q So –

A We made a left turn back towards the complex, yes, sir.

Q Once you came out and turned in that direction, did you see Bobby Holmes again?

A He came out from the church just ahead of us into the road there at Ross Cannon and stopped, yes, sir.

Q And did you have the opportunity at that point to have a discussion with Mr. Holmes?

A We – Otis – Officer Driggers got out of the [2422] car on the passenger's side. He was the passenger and I was driving, and we got out and spoke with Mr. Holmes there in the road.

Q Okay. Based on that night – at this point you are looking for him to arrest him, is that correct?

A Yes, sir.

Q Did you arrest Mr. Holmes at that time?

A No, sir, he turned and ran back toward the lieutenant, which he had come down to the corner there of First Street at the church and ran back toward the lieutenant and then turned down between two homes and ran off in that way.

Q Okay. And why didn't you arrest him at that point?

A We were unable to get ahold of him.

Q And did you, in fact, pursue him or attempt to pursue him?

A Yes, sir, we backed up and we took off. We didn't know which way he was going, and I followed him with the patrol car between two houses down into a ditch that runs behind the houses here on the left side of the road here, between that and the complex.

Q Okay. And do you recall approximately the last time that you saw him?

A Approximately 5:20.

* * *

[State's Witness Terrence Digsby –
Direct By Mr. Thompson]

[2427] Q Back at that time was there a disturbance at any point, during the time that you were at Cannon Court or his sister's house?

A Yeah, Bobby Holmes and Bobby Hemphill got in an argument.

Q As a result of that, did the police come?

A Yes.

Q When the police came, what happened at that point?

A We calmed down and they said we had to leave the premises.

Q Okay. And did Bobby leave at that point?

A Yes.

Q And can you tell me how he left?

A He ran.

Q And was anyone chasing him?

A Yeah, the police.

* * *

[2428] Q Okay. Did you leave at that point or sometime around there?

A I left a little bit after the police left.

Q Okay. And when you left, did you have a vehicle or did you walk?

A A vehicle.

Q And what vehicle were you using?

A My car. I had a Chevette, a blue Chevette.

Q All right. Had you been taking people around in this Chevette that night?

A Yes.

Q Can you tell me in the Chevette did you have any beer in there?

A Yes.

Q Had you all been drinking that beer that day?

A Yes.

Q Okay. When you left, what happened at that point?

A When I was leaving, I seen Bobby come over the wall – like a wall.

Q And where is the wall?

[2429] A Like going out of Cannon Courts, like a wall behind.

Q Behind one of the apartments there at Cannon Court?

A Yeah.

Q Okay. He came over it. What did he do then?

A I told him to get in the car.

Q All right. Did he get in your car?

A Yes.

Q Did he get in the front or the back?

A The back.

Q And what did you do at that point?

A I told him to lay down.

Q Did he?

A Yeah, but he kept on peeping up.

Q Okay. And that's before you ever got out of the road leading out of Cannon Courts?

A Yes.

Q Where did you go from there?

A I went to the corner.

Q All right. And did you turn one way or the other at that point? I believe that's at Ross Cannon?

A Evidently I made a left.

Q Down towards the church?

[2430] A Yeah.

Q What happened at that point?

A The police was sitting in the parking lot – in the parking lot right beside the street.

Q Okay.

A And they followed me.

Q Did they pull you over?

A Yeah.

Q Where did you pull over?

A Right beside the church, but it was in somebody's yard. Somebody's driveway.

Q What did Bobby do at that point?

A He got out and ran.

Q And what did you do?

A Sat there.

Q Okay. Were you – did you get arrested at that time?

A Yes.

* * *

[2436] Q Right. And Bobby was your age, or thereabouts?

A Yeah, it was in '89, in December.

Q Right.

A Yeah, I would be eighteen.

Q Is that right?

A Yes.

Q And Bobby looked, as far as his hair is concerned then, pretty much the way he looks now, right?

A Yes.

Q Short hair?

A Yes.

* * *

[2445] Q Okay. They came up and started asking you about some stolen car?

A Yeah.

Q And about Bobby Holmes' involvement in it?

A Yes.

Q And as a result of that they got a warrant for Bobby Holmes?

A Yes.

* * *

[State's Witness Officer William C. Mobley – Direct By Mr. Pope]

[2479] Q And could you tell the jury when you arrived there, what you then observed?

A When I arrived, there was Lieutenant Barnett, Officer Edwards, Bobby Brakefield. I also seen the York Rescue ambulance parked outside the area.

As I approached the front of the apartment, I noticed the rescue personnel coming out with the stretcher.

* * *

[2482] Q Okay. Did you do any – and in addition to receiving that evidence, did you do anything else, as far as the scene itself?

A Yes, sir, after I talked with the officers, I think I instructed Lieutenant Barnett to go to the hospital to talk to the victim there at the hospital, and also asked Officer Edwards to go door to door and start talking with people in the area to see if anyone seen or heard anything.

I think at that time Officer Johnson showed up with the bloodhound, and I think him and Chief Morton got together.

At that time I went inside the apartment and closed and locked the door and started processing the apartment.

Q Okay. You talking about closing and locking the door, who else was in the apartment with you when you did that?

A I was in there by myself when I processed it.

* * *

[2485] A I did recover a telephone that was – it was unplugged. I believe it was sitting on the kitchen table. Also a pocketbook that was sitting on the kitchen table also.

Q Okay. Did you have the opportunity – again, tell the jury – okay – all right. You have – now you have looked over the scene, you have looked for evidence, what else is entailed in processing the scene?

A After that, I started dusting for fingerprints. I started in the bedroom, where the incident was supposed to have occurred at, and I started working my way towards the front of the house.

I started in the bedroom, dusting around the bed, the dressers, around the door panels.

Worked my way into the bathroom. I think I dusted the sink, commode, around the door. Even dusted some in the floor to see if there was footprints.

Worked my way back into the kitchen area, around the sink, the stove, kitchen table.

Basically worked my way out of the apartment.

Q Back toward the front door?

A Yes, sir.

* * *

[2487] Q And you were explaining to the jury, as you were working out toward the exit – was there only the one exit?

A Yes, sir.

Q Okay. As you were working toward that area, what, if anything, did you find in any of the areas concerning fingerprints?

A In the residence itself, I found several smudges in the kitchen area around the sink, the stove area. But a smudge – in order to identify any fingerprint, you have to have ridge [2488] characteristics or identifiable characteristics that you can identify that particular print from.

The smudges didn't contain any characteristics that would be suitable for any identification.

I worked my way back to the front door. On the interior part of the front door, just a little bit above the doorknob and the door lock, I found a latent print that I developed that did have enough ridge characteristics and identifiable points that I felt like would be suitable for identification.

* * *

[2493] Q As far as working the door, did you come outside and ultimately work the outside of the door?

A Yes, sir, I did.

Q And did you find identifiable print, for lack of a better term?

A Yes, sir, there was – there was another identifiable print on the outside of the door. Here again, I developed it. I believe I took a photograph of it and also lifted that one also.

* * *

[2495] Q Okay. And you mentioned the super glue thing on the phone. That's just a different technique as opposed to the powder?

A You still have to go back to use the powder. It's just the phone is black. The super glue would enhance the print a little bit better and make it a little bit more visible, since the phone itself was black and I'm using black fingerprint powder. And it would just enhance the print a little bit more and enable me to see. If there was a print there, it would enhance the print a little bit more to give me an idea if there was an identifiable print there.

Q Regardless, the pocketbook or the phone, you did not recover an identifiable print in either one?

A No, sir, I did not.

* * *

[2497] Q Okay. Based on the investigation as it evolved that morning, did you find an individual, a suspect, that you were looking for?

A Yes, sir.

Q All right. Who was that suspect?

A Bobby Holmes.

Q Okay. And what, if anything, did you do as far as trying to locate him?

A We started attempting to locate Holmes, probably it was about midday sometime. I would say 11:30, twelve o'clock. We had officers out trying to locate him.

Q Okay. Did you have an opportunity to actually go down – do you recall where he lived or one of the places that he lived at that time?

A Yes, sir, I had information that he was living at, I believe, at 124 Valley Road.

Q And could you tell the jury where that's located?

A It's about – if you go down from California Street approximately about another block, take a left and go down probably three blocks. From there. It's also located on the south end of York.

[2498] Q Okay. And did you say you had an opportunity to go there?

A Sergeant Smith and myself went by there earlier in the day. I don't not recall the exact time, but we did go by there, got out and knocked on the door. Did not receive an answer, and we left.

Q Okay. Did you have an opportunity to go back there later in the afternoon, around 2:00, 2:15?

A Yes, I did.

Q Could you relate to the jury what occurred when you went there?

A We went back. I believe it was a little bit after two. I'm not – about 2:15, 2:20, 2:30. I'm not exactly sure of the exact time.

When we went back this time, there was a vehicle parked in the driveway of the house. Sergeant Smith and myself, we went to the front door and knocked on the door. At that time an individual by the name of Willie Holmes came to the door and opened the door.

* * *

[2511] Q Okay. And you were explaining to the jury that what happened when you got there, and Mr. Holmes – not Bobby Holmes, but Willie Holmes, I'm sorry. Could you explain to the jury what occurred when you spoke to Mr. Willie Holmes? You were explaining when the jury left. Could you explain that?

A While we were there in the living room, as stated, we heard a noise in the back – or the front bedroom.

Officer Smith, Willie Holmes, and myself proceeded to the bedroom. Sergeant Smith knocked on the door, identified himself as a police officer. At that time the door opened and Bobby Holmes was standing there. He had on a black hooded kind of pull-over type sweat shirt on and was in his underwear and white socks on. He answered the door. At that time we told Bobby Holmes that we had warrants for his arrest.

Q And that was not for this case?

A That was not for this case.

Q Okay.

A At that time Bobby Holmes became very upset, started making some threats towards some individuals. At that time we told him he needed to [2512] go ahead and get dressed, that – at that time he proceeded to get dressed. While he was getting dressed, Sergeant Smith

was standing there and noticed a blue and white striped tank top laying in a chair at the foot of the bed. And at that time Sergeant Smith noted to me that it appeared the tank top had some blood on it. At that time Bobby Holmes stated that the blood came from a fight at Clyde's the night before. As a result of that, we asked both Willie Holmes and them if they had any objection if we took that tank top with us. He said he didn't.

THE COURT: Who said he didn't? You got two people in there. Willie and Bobby, so make sure you tell us which one it was.

A Willie Holmes said he didn't have any problems. Bobby Holmes never – I don't think he never commented to the affirmative or negative.

Q When you were there at that time, this was now – you have been dealing with Ms. Stewart's situation that morning. This is now over into the afternoon of that same day, is that right?

A That's correct.

Q Were you aware at that time before you saw the tank top of the nature of her injuries and the [2513] things that occurred?

A Yes, sir.

Q And so at that point you actually recovered the tank top?

A Yes, I did.

Q Was he allowed to get dressed?

A Yes, sir.

Q And did Officer Edwards come to Valley Road and bring the warrants?

A Yes, sir. Officer Edwards was called to meet us over there. He transported Bobby Holmes in a marked unit and transported him from Valley Road back to the York Police Department.

Q And did you and Officer Smith ride with him in that vehicle?

A No, sir, me and Officer Smith rode in a separate vehicle.

Q Okay. And did you serve the warrants on him there at the house?

A No, sir.

Q Where did you serve them on him?

A The warrants were served there at the York Police Department.

* * *

[2521] A Once they get to the jail, we process them, we put them into what we call a jump suit. And he was placed in a jump suit and we take the clothes at that time.

Q At that time did you also recover his wallet?

A Yes, sir.

Q Okay.

(Wallet marked as State's Exhibit No. 22 for identification)

Q I'll show you what's marked as State's Exhibit No. 22 for identification.

Q Can you see if you can identify that?

A Yes, sir, this is the wallet he had in his possession.

Q Again, also was there money in that wallet at that time?

A Yes, sir. I think he had two ten-dollar bills, four five-dollar bills and four ones. Let see. That's right.

* * *

[2525] Q Okay. And on the following – and he talked about – just generally what was the information about?

A We had talked to him about why he was there, about the incident that we arrested him for. We also went into the thing about the incident involving Mary Stewart.

* * *

[2529] Q Likewise, during your investigation, you had [2530] the opportunity at one point to go to Divine Savior and receive the rape kit that they did for Ms. Stewart, is that correct.

A Sergeant Smith and myself went down there.

Q Okay.

A I think Sergeant Smith was the one who actually signed for it, but I was with him –

Q Okay.

A – when he got it.

Q And where is Sergeant Smith now?

A He's deceased.

Q Okay. And you had indicated earlier that sometime later that afternoon Bobby Holmes went with you to Divine Savior and gave a blood sample also, is that correct?

A That's correct.

Q And, again, you saw that take place?

A Yes, sir.

Q Again, when it was given to you, it was sealed for delivery to SLED also?

A Yes, sir.

* * *

[Officer William C. Mobley –
Cross By Mr. Nettles]

[2559] A I looked to see what was inside. I never did take them directly out of the bag.

Q That's right. But you opened it up, you moved one to one side so you could see what was in there?

A Yes, sir.

Q You weren't wearing gloves when you did that?

A I don't recall whether I was or not.

* * *

[2561] Q Did you maintain custody of the gloves in a separate bag, once you took them off?

A No, sir.

Q Have you ever done that?

A No, sir.

Q So then we have got no evidence of whether you were wearing gloves or not?

A No, sir.

Q Okay. Now, as a matter of fact, you don't even remember whether you were wearing gloves or not?

A That's correct.

Q Now, several of these items have a number of – several of these bags contain a number of different items. And on the outside of the bag – we have the bag here. It's not listed what's in the bag, is it?

[2562] A No, sir.

Q So someone had to look through the bag to determine what was in the bag?

A I'm the one who kind of looked through the bag to see what I could determine that was in the bag.

Q That's all I'm getting at. And you had to do that in order to make this list?

A That's correct.

Q Because this wasn't a running list that the person who gathered the information didn't put it on there. You gathered all this information. And when you were going to make this documentation a condition of the evidence, you had to go through the bags to figure out what all was in there?

A I did a visual look into the bag and made that list on my observation.

Q Okay. You did not change gloves. Well, first of all, you didn't wash your hands between checking one bag and the next, did you?

A No.

Q You didn't – and so you don't remember whether you were wearing gloves or not. But if you were wearing gloves, you are telling us you wouldn't have changed your gloves anyway?

A No.

[2563] Q No, or you would have changed your gloves?

A No.

Q You would not have changed gloves?

A No.

Q You would not changed gloves. Would you have changed your gloves between bags?

A I don't think I even – the inventory wasn't even made there at the apartment. The bags and things were brought back to the police department where the inventory was made.

Q Okay. Where in the police department was the inventory made?

A In my office.

Q Okay. Where in your office was the inventory made?

A On my desk.

Q The inventory was made in your office. You took all the bags and you made this inventory and filled this out?

A That's correct.

* * *

[2614] Q Did you look for prints on any of the money that was found on Bobby?

A No, sir.

Q Ms. Stewart – I mean, if that was her money, there certainly a chance there would have been fingerprints on it, right?

A I can't comment. I don't know.

* * *

[2618] Q Now, what was the condition in this – in this evidence here now – this here we have – this was found by you at some point and this was brown bag containing two paper towels what appears to have blood on them.

A Yes, sir.

Q Correct.

Now, if this document is dated 1-9 of 1990?

A Yes, sir. That's when it was transported to SLED.

Q That's when it was transported to SLED. When was it found?

A The day of the incident.

Q Why did this evidence not go to SLED with the rest of the evidence?

A It was overlooked. It was not transported the day – when I discovered it hadn't been sent, we took it at a later date.

Q Okay. So where did this evidence stay for [2619] eight days?

A In the evidence room.

* * *

Q Okay. But this – it appears to have blood on them, so you documented presence of blood on those papers towels?

A Yes, sir.

Q Okay. Now, let's look at – this is the documentation of evidence that you did, correct?

A Yes, sir.

Q And this is brown bag containing one blue/black robe?

A Yes, sir.

Q One pink nightgown. One pair of flowered shoes?

A Yes, sir.

Q Brown bag No. 2, containing bedding from victim's bed, white sheets and flowered sheet, correct?

A That's correct.

Q 3. Bag 3 containing pink robe, one pink nightgown, white, victim wearing at the time of assault, correct?

[2620] A That's correct.

Q There is – now – and then down here once again we have got the towel with the blood on it, correct?

A Yes, sir.

Q There is no documentation of any of the presence of any blood at the time it was sent to SLED, is there?

A On those items?

Q Yes.

A I didn't pull the items out to check. I didn't see.

Q I understand. But this is the best documentation we have got of the evidence at the time it was gathered?

A Yes, sir.

Q Okay. And the best documentation that we have got of the evidence at the time that it was gathered does not mention any blood on either of the nightgowns, correct?

A I think if you will look on the exam requested, on the documentation, we asked for sample to be examined for blood.

Q Okay. And but you certainly you – you documented it in No. 9, didn't you?

[2621] A Yes, sir.

Q Okay. Back here – and this represents the best documentation we have of the condition at the time this evidence was gathered as well, and we don't have any documentation of – at the time the evidence was gathered of any blood on a white shorts that belonged to Bobby Lee?

A No, sir.

Q We don't have any documentation of any blood on any sweat jacket by Bobby Lee?

A I didn't notice any.

Q Okay. As a matter of fact, right here we have got white plastic bag containing blue/white striped shirt, right?

A That's correct.

Q That's the blue/white striped shirt that you gathered out of his room, correct?

A That's correct.

Q There is no documentation of any blood on the blue/white striped shirt that you say was gathered – that you say had blood on it when you gathered it out of his room, is there?

A I didn't document that, no.

Q Excuse me?

A I didn't document it, no.

* * *

(15)

No. 04-1327

NOV 30 2005

In The

Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF
) GENERAL SESSIONS
COUNTY OF YORK)

THE STATE) TRANSCRIPT OF RECORD
) 90-GS-46-1196
-vs-) 90-GS-46-1197
) 90-GS-46-1198
BOBBY LEE HOLMES,) 90-GS-46-1200
) MARCH 19, 2001
Defendant.) YORK, SOUTH CAROLINA

VOLUME VIII

BEFORE

HONORABLE JOHN C. HAYES, III, JUDGE; and a Jury.

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* * *

[In Camera Hearing On Use Of Third-Party Guilt Evidence To Impeach The Investigation]

[2683] MR. POPE: I mean, again, we end up doing exactly what you have ruled we can't do, is interjecting Jimmy White as some mystery man in this thing. You said they could ask if they had other investigations. They can't get in putting pictures of Jimmy White up. They can't get in the Jimmy White confessions, or did you talk to Jimmy White, leaving some trail. That's not a reasonable doubt. That is a collateral matter, as you have already ruled, Your Honor, and that's exactly where we are taking this thing. We just need a concrete ruling so we can operate within it.

THE COURT: Well, I thought I just did, as concrete as I can. I'm not – and that is, if they – if they – whatever they did in their investigation I think is fair game.

MR. POPE: So they can say – they can ask specifically about Jimmy White? Is that what the court is ruling?

THE COURT: Well, if they had him come in and give a statement, yes.

MR. NETTLES: Your Honor, additionally I would point out, and I think one of the other things we made abundantly clear through – and the reason this [2684] is important is this is all before any criminal defense lawyers got involved, four months after this crime took place, they bring Jimmy White in. They asked – and this is all in the record, since we did this all pretrial, and this is all done, you know, under oath, subject to cross-examination. Jimmy White came in and said "I was with

Junior Lytle." Okay. And that's what he said in his statement four months after this took place.

They immediately – and this is part of the investigation, Your Honor. That's how you investigate the veracity of the statement. They went to talked to Junior Lytle. Junior Lytle said "I never saw him that night."

Then my point would then be, with that information, they didn't take his clothes, they didn't take his shoes, they didn't take his fingerprints. I think the fact that there is a picture of him at the time that this took place where he's got longish hair. I think that's relevant, especially in light of the fact that – and let's be clear, that they're the people that moved in the fact that the man had longish hair.

I'm just laying the court out in very general terms that's where I plan to go with this [2685] cross-examination.

THE COURT: Well, I'm going to limit it to – I'm not – again, it's a fine line. I'm going to limit it to you inquiring, like I said, about whether there were other suspects. And if he says no, then I don't know where we go from there.

But if he says yes, then I think they have got a right to know who why they ruled that suspect out.

* * *

[State Witness Officer William C. Mobley – Cross By Mr. Nettles (Proffered Testimony)]

[2695] Now let me ask you this. Did you take Jimmy White's clothes into evidence?

A No.

Q Did you take Jimmy White's shoes into evidence?

A No.

Q You did draw blood from Jimmy White?

A Yes.

Q Okay. You did take Jimmy White's fingerprints?

A That's correct.

Q Jimmy White had longer hair than Bobby Holmes at the time this crime took place?

A That's correct.

Q You went – during the course of this investigation you went door to door seeking information from people about the facts – about this crime?

A That's correct.

[2696] Q You received information that Jimmy White was in the neighborhood around the time that this crime was to have taken place?

A Not at that time.

Q You didn't – you didn't receive information from Neshelley Gilmore that Jimmy White was standing in the parking lot around the time that this crime took place?

A I don't recall a statement from Neshelley Gilmore at that particular time.

Q Okay.

A I think she made a statement that come out sometime later.

Q You were aware that Jimmy White has made statements to people that he is the person who did this?

A There are conflicting statements that – my understanding about – are we going into hearsay?

THE COURT: Right now he's asking you – the jury is not in here. If you just answer what he asks.

A There is conflicting statements. I think we have talked to some of the individuals.

* * *

[2710] THE COURT: This is very difficult, but looking at Gay, in Gay, Judge Cooper, after a proffer, did not allow testimony regarding certain information developed through the police interviews. And that's on page 69 of the advance sheets. The court seemed to look at the third-party guilt in sort of a package context. And to quote our solicitor, it's either got to be fish or fowl. And that is where I find myself.

I'm going to, in essence, restructure my ruling and I find that it's premature for the court to allow any evidence regarding third-party guilt, whether through investigation or as substantive evidence, until such time as the State is equipped with enough to make a decision that the totality of the evidence falls within the Gregory standard. Until that time, I find that it's not relevant.

It's certainly – I know I guess you could argue that it perhaps it is impeachment evidence. I'm not sure what would be impeaching, but I'm – I feel like I'm bound by the latest pronouncement of the court, and that is at some point, once I can rule, I can – I may be in the position to rule whether we can go into third-party guilt or not [2711]

before we get there, we are going to have to stay away from it. So I'm precluding those line of questions.

* * *

[2713] MR. NETTLES: Okay, that's fine. That's just what I need to know. The court has ruled that I can't discuss in any way, shape or form the investigation of anyone else in relation to the commission of this crime?

THE COURT: That's the ruling.

MR. NETTLES: Okay.

THE COURT: And for your benefit, and I don't think that this would be considered a motion in limine, because we are in the middle of a trial –

MR. NETTLES: Right.

[2714] THE COURT: – and been proffered.

MR. NETTLES: Right.

THE COURT: I feel this is the time to make it and the time –

MR. NETTLES: Yes, sir.

THE COURT: – to rule, and I don't feel like you need to – I think you are protected. I don't think that you need to keep turning to me every time and say, Your Honor –

MR. NETTLES: It is.

THE COURT: – here is where I would ask one of those questions.

MR. NETTLES: Thank you.

THE COURT: Because I just think that's not what the courts require, but I don't want you to be in a situation where you go up and the court says, well, the judge just made a preliminary ruling. This isn't a preliminary ruling. This one is long, long and hard thought out to the degree I'm capable of it, well thought out, and that is the ruling.

MR. NETTLES: Okay. Your Honor, I would like, for the record, that by not allowing this, it violates Mr. Holmes right to a fair trial secured by – to my client by the Due Process Clause of the United States, secured by the state and federal [2715] constitutional right to present a complete and adequate defense, as contained in Washington v. Texas, and the right to effective cross-examination under the right to confront them with the state and with the federal constitution. Thank you.

* * *

[Jury Seated]

* * *

[State's Witness Officer William C. Mobley –
Cross By Mr. Nettles]

[2727] Q In this whole house you only found two fingerprints?

A That's correct.

Q In this case you seized the phone, correct?

A That's correct.

Q Where is the pocketbook that you seized?

[2728] A I gave it back to the victim's family. They were needing her Medicaid card and the information –

Q Okay.

A – for the hospital.

Q And her Medicaid card or information was written on the pocketbook?

A No, it was in the pocketbook.

Q But you didn't retrieve – you didn't maintain the pocketbook, did you?

A No, sir, we processed the pocketbook. There was nothing found on it. We released it to the family.

* * *

[2734] Q Now, in the tape Ms. Stewart is saying "the phone. The phone." She's calling to you to check the phone, isn't she?

A She said possibly there was prints on the phone.

Q She's going "the pocketbook." She is saying "the pocketbook?"

A Yes.

Q "Check the pocketbook."

A We checked the phone and the pocketbook.

Q And you didn't maintain them, did you?

A Yes.

Q Well, that's maintained?

A Not now.

[2735] Q Okay. And so after you checked the phone, you checked the phone, you decided there weren't any fingerprints?

A Did not see any fingerprints.

Q And did you decide that there weren't any fingerprints?

A I decided there were no fingerprints.

Q You listened to the tape?

A Sometime.

Q Within a couple of days. You and I have agreed on that, right?

A Yes.

Q You listened to the tape?

A Yes.

Q And then you didn't say wow, I better send this phone to SLED because this lady is very adamant about the fact that this man touched the phone? You didn't do that, did you?

A No.

Q And with the pocketbook, it's the same thing. You, as not an expert, made a decision that there were no fingerprints on the pocketbook, right?

A That's right.

* * *

[2737] MR. NETTLES: At this time, Your Honor, we would Defense 9 into evidence.

THE COURT: Without objection?

MR. POPE: That is correct, Your Honor.

THE COURT: Okay.

Q This is a shoe print?

A Yes.

Q Shoe print is evidence?

A Yes, sir.

Q As a matter of fact, there is one defined shoe print here, correct?

A Appears to be, yes.

Q And then there appears to be another one here, right?

A I can't see.

Q Well, let me bring it a little closer for you.

A Yes.

* * *

[2747] Q Now, where was that foot – you don't have a document – we have got this – yesterday we looked at this – we looked at the crime scene, this. All right. This is the only – other than the pictures [2748] that you took, this is the only diagram we have of the apartment, correct?

A That's correct.

Q You don't mark the footprint on there anywhere, do you?

A No, sir.

Q Well, you took the time to write bathtub, right?

A Yes, sir.

Q You wrote bedroom, and that had some significance. We wanted to know where the assault took place, right?

A Yes.

Q You wrote sink, bedroom, furnace, lamp, china. You didn't – you didn't – there is no doubt that footprint came out of this apartment, right?

A That's correct.

Q Okay. But you didn't document where, did you?

A Well, I didn't make the chart there.

Q Is there any other chart where you document where it was done?

A No, sir.

* * *

[2754] Q Okay. Now, no one has identified him, correct? I mean, you haven't showed any photo lineups to anybody taht said I saw that guy there, have you?

A No.

* * *

[2755] Q And you arrived at 8:46, correct?

A Yes.

Q Okay. You gathered the evidence from Ms. Stewart's apartment?

A Yes.

Q As a matter of fact, you kind of came in and then you sent everybody out, you closed the door, you locked the door, and then you began to process the crime scene alone, correct?

A That's correct.

Q Okay. Now, at 11:18, you left her apartment with all the clothing that you gathered from that location and – correct?

A That's correct.

Q And you went to discuss this case with the other officers involved?

A Yes.

Q Okay. Now, at that point you had clothes, right?

A Yes.

Q You had two fingerprints, which you didn't know [2756] who had done them?

A That's correct.

Q You didn't know whose prints they were. For all you knew, they could have been EMS person's prints?

A That's correct.

Q They could have been Ms. Stewart's prints?

A That's correct.

Q They could have been any of the officers prints?

A That's correct.

* * *

[2777] (Photograph of Defendant Bobby Holmes marked as Defendant's Exhibit No. 39 for identification)

Q This reflects how he looked when you arrested him that day, the day he was arrested?

A Yes, sir.

MR. NETTLES: At this time I would move Defense Exhibit 39 into evidence, Your Honor.

MR. POPE: Without objection, Your Honor.

THE COURT: It would be received.

MR. NETTLES: Thank you.

Q You would agree with me – and we have talked about this. You would agree with me that this hair is shorter than Mr. Barnett's was at the time that this picture was taken?

A Shorter than –

Q Lieutenant Barnett's hair was.

A Was?

Q Yes, at the time this picture was taken.

A In 1989?

Q Yes, sir.

A Possibly, yes, sir.

Q You would agree with me that that is not longish hair, correct?

[2778] A That's correct.

Q Ms. Stewart said he had longish hair?

A Long, not too long, yes, sir.

Q Ms. Stewart said the man was in his middle aged late twenties, correct?

A I believe that's a correct statement.

Q Bobby Holmes was seventeen, eighteen years old when he was arrested?

A Yes, sir.

Q You questioned Bobby Holmes?

A Yes, sir.

Q Bobby Holmes has always denied that he committed this crime?

A Yes, sir.

* * *

[State's Witness SLED Agent Steven Derrick – Direct by Mr. Pope]

[2870] Q Okay. Did you have an opportunity to observe the interior door where the – and I would refer you to State's Exhibit 14. Did you have an opportunity to observe the interior door of that apartment?

A Yes, sir.

Q Do you recall whether if had been processed at the time that you saw it?

A Yes, sir, to the best of my memory, the fingerprint powder was still present on the door, all except one area, which indicated that a section of it had been lifted out.

Q Did you ultimately receive the lifts that actually came from both the interior of the door and the exterior of the door?

A Yes, sir, I received them that day while we were there.

Q Okay. And I show you Defendant's Exhibit 6, State's Exhibit 16, and ask if you had an opportunity to look at those?

A Yes, sir, I have.

* * *

[2876] Q In this particular case what were the ultimate results of your examination? You had two items that you were able to look at. The fingerprint from the outside, let's begin with it. The fingerprint on the outside of the door, were you able to match that to anybody?

A No, sir, I was not.

Q Okay. Let me ask you, did you obtain the victim's fingerprints to compare with that outside fingerprint?

A No, sir, I did not.

Q And why was that?

A The day that myself and Agent Gainey were there, was in York, the victim was in the hospital and we were not able to get to the victim to obtain known inked standard because of her health condition. Subsequently later it was, I understand, that she had died, but we were not made aware of that fact until after her funeral services. Therefore, we did not get any known inked standards from her and did not know of any existing one for personal identification.

Q So as far as the external print, you have no means – you have not identified who that is, is [2877] that correct?

A No, sir.

Q Okay. What were the results on the internal print?

A The internal print, which was the partial palm, was identified to the inked standards of Mr. Bobby Holmes.

Q Okay. You had indicated earlier that you had talked about orientation, as far as using the left hand. Can you describe to the jury how you arrived at that?

A In looking at the latent itself, within the latent I can see the edge of the hand, using this hand, specifically left hand. I can see where the ridges end and I can see where the other skin formation begins.

Knowing how ridges flow, in this particular area of the hand, with their movement in motion, immediately led me to start my examination on the left hand, by the ridge flow and the mere fact that my ridges ended and I could see the edge of the hand itself.

Q Did you have the opportunity to compare the lift – and also you said you went and looked at the door, but at that point the area had been removed, [2878] the tape had been removed, is that correct?

A That's correct, there was an area where something had been lifted away.

Q Okay. Did you have an opportunity to look at State's Exhibit 14 to determine if you saw where the orientation of the print on the door?

A Yes, sir.

Q Okay. Could you explain to the jury, based on your examination, the orientation of the print on the door? Perhaps if you would step down, please, sir.

A Yes, sir.

(witness off the witness stand)

Q If you would explain. You said it's from the left hand, is that correct?

A That's correct.

Q Okay. And could you indicate to the jury the orientation of that print?

A Using the photograph and finding an outlaid pattern that corresponds to the pattern from the lift, the orientation would be fingers down, palm making contact with the door in this manner.

Q Okay. Could you then orient the jury on State's Exhibit 15? You might have to step up for them to see and show them the orientation of that [2879] print?

A Yes, sir.

Q So is it fair to say on State's Exhibit 15, the tape is to the right of the print, as properly oriented as it would have been on the door?

A Yes, sir.

Q And so the State's label is at the top of that, is that correct?

A That is correct.

Q Okay. Thank you, sir.

Did you also prepare a diagram to explain to the jury your identification?

A Yes, sir, I did.

(witness back on the witness stand)

Q And do you feel that it would assist the jury in understanding the comparison points that you have indicated?

A Yes, sir.

Q Okay.

(Poster of Lifted Print and Inked Print marked as State's Exhibit No. 33 for identification)

BY MR. POPE:

Q Does this accurately depict items of evidence, the inked print and the lifted print that you looked at?

[2880] A That's correct.

MR. POPE: Your Honor, I move State's Exhibit 33 for identification into evidence.

MR. MACDOUGALL: Without objection, Your Honor.

MR. POPE: It would be received, without objection.

BY MR. POPE:

Q Agent, if you could, I would ask that you step down and explain as you have the identification of the print and explain to the jury what your diagram depicts, if you would?

A May I step down?

MR. POPE: Yes, sir.

(witness off the witness stand)

BY MR. POPE:

Q Would it assist you if I hold it for you, or can you hold it yourself?

MR. POPE: Counsel, y'all position yourself where you can see over there.

Wait just a second.

THE WITNESS: Yes, sir.

A What I have before you is enlarged photographs and properly labeled, this being an enlarged photograph of the latent print, the latent lift that I just had my hand on a second ago, and an enlarged [2881] photograph of that section of the left palm of Bobby Lee Holmes, the known inked prints.

You will see in both of these photographs that I have a number of arrows and numbers corresponding to both the inked print and in the latent print. These corresponding lines or numbers go to those points of identification that I spoke of earlier that correspond both in the inked print and in the latent print.

Using point No. 1, which is represented in both, the inked and the latent print, this is one of those ridges that starts off as a single ridge, divides off having two ridges that continue to flow in the pattern.

Point 1 of the inked is in the same unit relationship as point 1 in the latent.

Coming down to approximately five ridge counts, the next point is actually point No. 12 that I have on here. You see, this is a ridge that starts off in a pattern and then it abruptly stops and ends, while the ridges next to it continue to flow in the pattern surrounding it.

Coming down another ridge count – correction, three ridge counts, and we come up to point No. 2. And again this is another ending ridge.

[2882] Throughout these twelve points that I have charted here, these are these ending ridges, dividing ridges, and short ridges that are represented in both the latent and in the known inked standard.

This is just twelve of approximately fifty of these points of identification that were in the same unit relationship in both inked and latent print, thus making the identification of this latent with a known inked standard of Bobby Lee Holmes.

Q Does that again mean that that match is unique to Bobby Holmes and no one else in the world?

A That's correct.

* * *

[SLED Agent Steven Derrick –
Cross By Mr. MacDougall]

[2896] Q Agent Derrick, we are looking at what's been marked State's Exhibit 16.

A Yes, sir.

Q I believe you looked at that in detail.

A Yes.

Q It's what I'll call sideways, in the sense that it's oriented left to right rather than up and down.

A Okay, sir.

Q And do you see within the print some series of vertical lines?

A Yes, sir.

Q Now, in any print there is – the impressions are made by the ridge lines and there was also any artifacts that appear in the surface. Do you agree with that?

A Yes, sir, especially on a rough surface.

Q I understand that. And those lines, I'll call them striations, appear to have been on the original surface where that lift was taken. Do you agree with that?

A Yes, sir.

Q And that could be paintbrush lines, or it could be wood grain, or it could be any other abnormality?

A Yes, sir.

[2897] Q But you agree that those vertical lines, which, because of the orientation of the printer at the moment horizontal are, are artifact from the surface on which that print was taken?

A I would totally agree.

Q I'm going to now show you Defendant's Exhibit 6 in evidence and I'll ask you if that print, as it's projected there, is consistent with what you examined?

A Yes, sir.

Q And that's the print from the front of the door. We just looked at the print from inside of the door. Do you agree with that?

A Yes, sir, based on what was labeled on.

Q Exactly. Now, looking at the print from the outside of the door, which I believe was also the print that did not have a diagram, do you see any striations there at all?

A No, sir.

Q Would that indicate to you then that that print was taken from a surface different from the print that we just looked at, the palm blade print with the striations?

A It would have been lifted from a smoother surface, but also by all the grain in the smaller [2898] dots away from it, it would indicate to me that it would be a surface that would probably be dirty or something had built up or adhered to it, thus allowing the fingerprint powder to adhere to all the little dots that's out and around from the latent print itself.

Q And you see little of that on the State's Exhibit 6, the print from the inside of the door?

A That's correct.

Q Okay. So the print that we are looking at on the outside of the door, to sum up, has no striations and appears to be a different kind of surface than the print on the inside of the door with the striations?

A That's correct.

* * *

[2907] MR. MACDOUGALL: I take it that you have trained new investigators and new agents, and the reason that they have someone like you training them is that you have much to teach them?

A Yes, sir.

Q You know things by virtue of experience and other training that they just don't know?

A Yes, sir, that's a fair statement.

Q And part of that translates into what I'll call the art of what you do?

A Yes, sir.

Q Recognize things that other people won't recognize? You see things that other people won't see, is that correct?

A That's a fair statement, yes.

Q And that could extend to fingerprints as well, couldn't it?

A Yes, sir.

Q In other words, I could take a forty hour course and be given a, you know, a toaster in a kitchen that supposedly was handled by a criminal and I could work on it and maybe I could find some prints and maybe I wouldn't. I could turn it over to you and you might find some things that I wouldn't find?

[2908] A Yes, sir.

Q In fact, you would be likely to, with as much experience as you have?

A Yes, sir.

Q Now, given that fact, dusting is not the only method of detecting prints, is it?

A No, sir.

Q And another way of saying it is one man's smudge is another man's fingerprint?

A I hadn't heard it put quite that way, but yes, sir.

Q You wouldn't disagree with that?

A No.

Q What I would like you to help me with, Agent Derrick, is talking about some of those other ways that fingerprints are processed. I have heard references to super glue and a glue tank. Is the more technical term for that cyanoacrylate fuming?

A Yes, sir, that's correct.

Q Would you tell how that works?

A What it is it's the cyanoacrylate that is in super glue that bonds to the greases and oil and the residue that is transferred from the fingers to a surface. There are number of ways that this could be done. The fastest more efficient way is the one [2909] that he spoke of using a tank. Applying a heat source to the liquid glue, changing it from a liquid to a vapor. And as this vapor expends out in the tank and over the object that's being fumed, it will adhere to this residue that transferred from the fingers to that surface.

Q There is also a method involving lasers and alternative light, is that correct?

A Yes, sir.

Q Would you tell us how that works?

A Keep in mind under today's use of alternate light and the capabilities of laser and alternate light in 1989 and 1990 is a lot different.

I had an opportunity to go train under Dr. Menzel, who is the one that had the first publication of using a laser and chemical dye stains to make invisible prints visible by using a light laser, which is a laser that alternates light from the general light that we see here and causes these chemicals to fluoresce, allowing the examiner to photograph this ridge detail and do an examination.

The laser in 1989, 1990 was kind of where the science fingerprints was in America in 1933. It was on its foundation. At one point in time we had a laser at SLED, but because of its lack of [2910] effectness, we donated it to a university and we went to a system of using alternate light systems, which we can – this system can break light down into certain spectrums, using certain chemicals that will get excited by this light, causing them to fluoresce. This is just another aid or a tool in enhancing more so than developing latent prints on objects.

Dealing with the solid objects that counsel spoke of a little bit ago with the cyanoacrylate fuming, that's normally the first stage. And when appropriate chemicals are applied to it, that will adhere to this bonded super glue, causing it to fluoresce in making this print with a contrasting background and show better visibility to me as the examiner.

Q Now, it's correct, isn't it, that the glue tank, super glue, really only works with nonporous materials, is that right?

A That's correct, hard objects, glass, metal?

Q Like a telephone?

A Sure.

Q Okay. And that alternative light is really the best – that's the alternative method for looking at porous objects?

[2911] A I don't know that I would agree that it's the best. It's one of the tools.

Q Let me exemplify that or simplify that. If I was dealing with a black telephone and I cyanoacrylated it, when the glue adheres to this black telephone, it's going to outline the ridge detail in white. So I have basically a reverse of the latent lift I had here, which was a white background with black powder. The cyanoacrylate would be white detail on black background.

In that particular case there is no need to use an alternate light system. A simple photograph would capture the same thing that the alternate light and fluorescent dyes would capture.

Q I guess I asked the question in not the best way. Specifically cyanoacrylate fuming is only useful for non-porous specimens is my point?

A Yes, sir.

Q That purse, for example, could not be something that would be subjected to cyanoacrylate successfully?

A Yes, it could, depending on the makeup of the purse.

Q Leather?

A If it's a leather purse, then there was a [2912] potential that the fuming would work on it.

* * *

[2914] Q In this case, Agent Derrick, were you given anything other than these two lift cards to analyze?

A No, sir.

Q Okay. Were there any objects that you were given up to this date to apply DFO or alternate light to?

A No, sir.

Q Or the glue tank, for that matter?

A No, sir.

Q I'd like to ask you specifically about a process called physical developer, PD. Are you familiar with PD?

A Yes, sir.

[2915] Q What is PD used for?

A Physical developer, that is basically a final stage that is used on paper and cardboard items.

Q And one of the things that's particularly used on by people in your line of work is currency?

A Yes, sir.

Q Is that correct?

A Yes.

Q So if I go out and rob a bank and the dye markers aren't in there, but I'm later found to be spending hundred dollar bills that I didn't have before, one way you would prove me guilty would be to use PD on that currency?

A The physical developer, yes, sir.

Q Okay. Now, if I had currency that I believed had been stolen from a crime victim, one of the things that I could use was PD, isn't it?

A Yes, sir, it could be.

Q And I could look on that currency, using PD, and see if I could find fingerprints of the victim of the crime?

A That's correct.

Q And that would be suggestive of whoever that currency might have some explaining to do with respect to that currency, is that right?

[2916] A Well, let me back up to my last answer. Yes, you could find the ridge detail. Whose ridge detail it was would result in the comparison identification.

Q Okay. But let me –

A May not be the person that committed the crime, but whoever handled the money.

Q Let me ask you this. Did anyone ever tell you that there was some currency involved in this case?

A Not that I recall.

Q And you were not given any currency to test, were you?

A No, sir.

Q But had you been given currency to test, you could have used PD to look for prints on it, is that correct?

A I don't believe we had the physical developer capability in 1989 or '90. Physical developer arose out of the old silver nitrate formerly. And it was a modified silver nitrate that physical developer is named for, because the old silver nitrate technique was so very light sensitive, that it could develop a print and then overexpose it in a matter of minutes. And I don't exactly recall when physical developer came on line with us, but I don't believe that was [2917] available in 1990.

Q But the FBI had it?

A But if they did, I wasn't aware of it.

Q Today, or any time in the last eleven years, you have never been given currency to test using PD, have you in this case?

A No, sir.

Q And, in fact, you don't have the known of the victim, Ms. Stewart, in this case to compare it to, do you?

A No, sir.

Q Okay. And, in fact, you never took a known, despite the fact that she lived for several months after the attack?

A No, sir.

Q How about vacuum metal deposition? That's used to develop latent prints on nonporous specimens, like a purse, is that right?

A That's correct, sir, yes, sir.

Q You are familiar with that?

A I'm familiar with the formulation and technique, but it's not one that we use at SLED.

Q Okay. But it's an acceptable process, one that's used by the FBI?

A Yes, sir. Originally came from the home office [2918] in England.

Q And you were never given a purse or any other items, porous item, to test using vacuum metal deposition?

A No, sir.

Q How about an ninhydrin acetone base? That's used for porous surfaces as well?

A Yes, sir, we use an ninhydrin with a different carrier. Acetone is the carrier. An ninhydrin is actually the chemical that develops the latent. And there are a number of carriers that could be used. That's one of them. But in using documents, acetone makes things run, so we use another carrier which is less likely to make it run.

Q So you were never given a phone?

A No, sir, not to my knowledge.

Q You were never given a purse?

A Not to my knowledge.

Q You were never given any currency?

A No, sir.

Q In fact, the only things that you were given are those two lift prints, those two lift cards that we have been talking about?

A That's correct.

Q And the only person in the world who knows [2919] where those lifts cards came from is Captain Mobley?

A I wasn't there when they were lifted, so I can't answer it. I know that –

Q You sure don't know?

A I don't know.

Q Okay.

* * *

[State's Witness SLED Agent John Barron –
Direct By Mr. Pope]

[2997] Q Agent Barron, based on the results of your testing, how many different matches did you find?

A Well, I found four distinct fibers. The black cotton polyester could be considered as one unit, so three or four matches, depending upon how you want to look at it.

Q Could you list the matches for the jury, the fiber that you found that's matching the item?

A Yes, the black cotton polyester that came from the bed clothing were matching the black cotton polyester fibers from the hooded shirt, hooded jacket.

Q There was a blue acrylic fiber recovered from the defendant's blue jeans that matched a blue acrylic fiber from the pink nightgown of the victim.

* * *

[SLED Agent John Barron –
Cross By Mr. MacDougall]

[3018] Q But you didn't use the taping method here. You used the scraping method, isn't that right, Mr. Barron?

A I used the method that I was trained to use.

Q But it was the scraping method. There is nothing to be ashamed of. It was scraping method, right?

A That's correct.

* * *

[3020] Q Mr. Barron, if I could ask you, please, my question – you are welcome to explain it beyond this, but how many clean rooms did you have?

A In 1990, we had one.

Q You had one. So that in 1990, knowns and unknowns were opened in the same room, is that correct?

A Yes, they were.

* * *

[3028] MR. MACDOUGALL: Now, I would like to talk to you specifically about those. In one instance I believe you testified that you found a gold modacrylic fiber on a pink nightgown, is that correct?

A Correct.

Q And you found a brown modacrylic fiber on a pair of underwear?

A Yes, sir. I called it brown because there was more than one fiber clumped together. It appeared to be brown to my visual color scheme, if you will.

Q We will get to that, but with respect to those fibers, neither the – well, let me ask it separately.

The gold fiber that you testified that you found in the pink nightgown was not taken from the undershorts? In a sense it was not a part of the undershorts, is that right?

A That's correct.

Q And in reverse, the brown modacrylic fiber on the undershorts was not – the cutting, it wasn't part of the nightgown, was it?

A That's correct.

Q So both of those fibers came from some place else? Do you agree with?

[3029] A I agree with that.

Q Mr. Barron, I'm going to show you a diagram that prepared to illustrate that testimony. I would like you to take a look at it and tell me if it accurately depicts what you just testified to?

A Yes, sir.

Q Okay. Would it be helpful to the jury to be able to see that diagram?

A I suppose.

Q Mr. Barron, can you see the chart from where you are?

A Yes, I can.

Q So your testimony with respect to the modacrylic fiber –

THE COURT: Can all the jurors see it?

MR. MACDOUGALL:

Q Mr. Barron, can you still see it?

A Yes, sir.

Q With regard to the gold and brown modacrylic fiber, your testimony is that from some unknown source, a gold modacrylic fiber was found on the pink nightgown?

A Right. I do not know the source of the gold modacrylic fiber.

Q That's why it's an unknown source.

[3030] A Right.

Q And from an unknown source, a brown modacrylic fiber ball was found in the underwear?

A Correct.

Q Okay. But where that came from is not something that you are testifying to today, because you don't know, do you?

A Correct.

Q Where either of those fibers came from?

A No, I just know they were found in both those garments.

* * *

[3034] Q I'm going to show you what's been previously admitted into evidence as State's Exhibit 16. Have you ever seen this before?

A No, sir.

Q Well, let me tell you what this is. This is a photograph taken of the bedroom of the victim's [3035] apartment the day after the attack.

A Okay.

Q Have a look on the floor, Mr. Barron. What do you see?

A A multicolored rug.

Q A multicolored rug. Sort of like the one Professor Needles was talking about that are frequently made from modacrylics?

A Rugs. Yeah, modacrylics are used in rugs.

Q They are. And do you see gold in there?

A Yes, sir.

Q Do you see brown in there?

A I see –

Q Pretty much every color, isn't that right?

A Yeah.

Q You can get pretty much whatever you want out of that rug?

A Correct.

Q Okay. Did you ever leave something on the floor of your bedroom?

A Did I ever leave something on the floor of my bedroom?

Q I sure have. Have you?

A Sure.

Q Yeah. Now, did any of police officers, I think [3036] you referred to them as the investigating agency, show you this picture?

A No.

Q Did they bring you this gold rug with the brown in it?

A No, sir.

Q Did they ask if you had anything else you wanted to look at from the apartment?

A No, sir.

Q Okay. With your unknown source and this picture I have just showed you of the crime scene, Mr. Barron, I bet you would have wanted to analyze that rug, wouldn't you?

A That would have been a good thing to do.

Q Might have been the unknown source?

A Could have been.

Q At least for the nightgown, right, the gold?

A Correct. Could have been the source of –

Q Could have been all kinds of things?

A Could have been.

Q It could have been all kinds of things. But, you know, the fact is we don't know, do we?

A Right.

Q And we are never going to know?

A Right.

* * *

[3038] Q Let's talk about the blue acrylic fibers on the pink nightgown. There is some similarity here, in the sense that the blue acrylic fiber is not part of the pink nightgown, is it?

A No, it is not.

Q And the blue acrylic fiber is not part of the blue jeans, is it?

A No, sir.

* * *

STATE OF SOUTH CAROLINA)
) IN THE COURT OF
COUNTY OF YORK) GENERAL SESSIONS

THE STATE) TRANSCRIPT OF RECORD
) 90-GS-46-1196
-vs-) 90-GS-46-1197
) 90-GS-46-1198
BOBBY LEE HOLMES,) 90-GS-46-1200
) MARCH 19, 2001
Defendant.) YORK, SOUTH CAROLINA

VOLUME IX

BEFORE:

HONORABLE JOHN C. HAYES, III, JUDGE; and a Jury.

APPEARANCES:

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WALTER WILLIAM THOMPSON,
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Attorneys for the Defendant.

* * *

[State's Witness SLED Agent Nancy Greene –
Direct By Mr. Pope]

[3169] Q Okay. And did you, in fact, receive a number of items of evidence in this particular case?

A Yes, I did.

* * *

[3172] Q Among those items, you received items from rape or suspect kits, is that correct?

A That is correct.

Q Okay. And, particularly, can you tell the jury what type items you received from the rape or suspect kit?

A Yes, in a rape or a suspect kit – well, let's say a rape kit. Items that are generally included in rape kit are the known standards from the victim and also any evidence that the physician collects, say, on swabs and that from a vaginal examination at the hospital.

And from a suspect kit, what I receive are the known standards from the suspect and blood and usually saliva samples.

Q Let me ask you. In South Carolina, we call them rape kits, sexual assault kits, where do they come from? Who provides them to the hospitals and to law enforcement?

A We keep them – the SLED laboratory, it's their responsibility to make sure that the hospitals have their supplies. They are ordered by the ordering department at SLED.

* * *

[3182] Q And that paper towel, what were the results of that?

A No semen was identified on that, but human blood was identified.

Q I refer you to I believe it's SLED No. 8. You had an opportunity to previously look at the evidence, is that correct?

A Yes, I have.

Q And I believe SLED No. 8, the blue tank top, recovered on the dog trail, that would be your SLED No. 8, State's 18?

A Blue tank top.

Q Okay. What –

A No. 8.

Q What's the result of that test?

A No blood identified.

Q Were you able to find anything from that item?

A No, I was not.

Q Agent Greene, in looking at your report, there were a number of places that you identified human blood, but could not characterize it further, is that correct?

A That is correct.

[3183] Q The places, of course with the exception of the defendant's known sample, which you identified, all other blood that you were able to identify was consistent with the victim, is that correct?

A That is correct, it was consistent with coming from the victim.

Q And based on your testing, I believe there was no indication of semen or spermatozoa from any of the testing that you did?

A That is correct.

* * *

[SLED Agent Nancy Greene – Cross By Mr. Nettles]

[3208] Q And the underwear, you able to – how big was the spot of blood on that?

A That was not very – that was not near as large.

Q Okay.

[3209] A It was a very much smaller amount.

Q But you didn't need a microscope to see it?

A No.

Q Okay. And the tank top, how large was the blood on the tank top?

A The tank top, it was not very large stain, but you could tell that it was a stain.

* * *

[State's Witness FBI Agent Frank Samuel Baechtel – Cross By Mr. MacDougall (Profferred Testimony)]

[3301] Q Let me – let me try to – I'm sorry I'm having a little difficulty with this, associate that with specific evidence, and this is more for my own understanding, certainly than yours.

The way I read this is that Q-4, the nightgown cutting assumed to be Mrs. Stewart –

A Yes.

[3302] Q – and K-1, the defendant's DNA, cannot be excluded as sources for the mixture that is found in the defendant's shirt, underpants, and the towel taken from the house. Do you agree with that?

A Yes.

* * *

[FBI Agent Frank Samuel Baechtel –
Redirect By Mr. Pope (Profferred Testimony)]

[3306] MR. POPE: I have one more question, just for the court. Your Honor, this is clearly just for purposes of the court's consideration for the third-party issues.

REDIRECT EXAMINATION BY MR. POPE:

Q Did you also have the opportunity to receive a subsequent sample, I think they were K4 – 3 and K4? This would be on your second report?

A Yes, I did.

Q Do you have that before you, sir?

A I have some information about that, yes, sir.

Q In regards to K4, the dried bloodstain of James White?

A Yes, sir.

Q Do you have that information?

A I do.

Q What were the results of your testing, when taking James White's DNA, as far as comparing it [3307] with these mixtures that you discussed?

A He's excluded.

Q And is that from all items that you tested?

A Yes, sir.

* * *

[State's Witness SLED Agent Lori Johnson – Direct By Mr. Pope]

[3333] Q During the time period when you were working at the DNA lab on this case, did you also act as somewhat of a liaison between the FBI and the local agency?

A Yes, sir, I did. Initially I wrote the letter to the FBI that accompanied the evidence when it was sent up for analysis. That letter, I provided the FBI with a list of the items being submitted for analysis. And I also told them a bit about the case, for their information.

I mentioned earlier that I incorrectly listed the item number for Bobby Holmes as 5.4.2, when it was actually 6.3.1.

In this same letter I also told the FBI that the victim, Mary Stewart, was caucasian, when she was, in fact, black.

* * *

[State's Witness SLED Agent Lori Johnson –
Cross By Mr. Nettles]

[3361] Q And you had in your possession, you had 5.4.2?

A That's correct.

Q Correct?

A Yes.

Q Okay. And that 5.4.2 had not been split in half, as 4.4.1 had?

A That's correct.

Q That 5.4.2 was gathered by, we have to assume, a trained medical professional at the hospital in Charlotte?

A Yes, sir.

Q Okay.

A I would assume that.

Q You have not told us that when you sent the blood to the FBI, that 6.3.1 was truly sent?

A That's correct.

Q And it was just a mislabel?

A Yes, sir.

Q Okay. So then you had – or SLED had in their position – in their possession 5.4.2?

A Yes, sir.

* * *

[3370] I realized that I made that error. And one month later – one months and two days later I wrote Captain Mobley another letter. And I state "the letter accompanying the initial report from the FBI indicated an inclusion of certain biological evidence was the suspect. The evidence used for comparison, however, was found to match the victim. Please note this change from the initial letter."

* * *

[3372] Q Now, I'm still kind of interested in 5.4.2. There was no serological testing done on 5.4.2, right?

A There – there is no item 5.4.2 on the serology report.

Q So we can assume there wasn't any testing done on it?

A Yes, sir.

Q Do you have 5.4.2?

A No, sir.

Q Well, you had it at one time, correct?

A Yes, sir, I did, but that was returned.

Q You returned it to?

A I returned all the evidence that I had to Susie Wilson.

Q Right.

A And the date of that was January 27th, 1994.

Q So even in preparation for this testing today, I mean, for this case, okay, for now, did they ever say hey, why don't we send 5.4.2 instead of the cutting from the nightgown?

A No, sir.

Q I mean, do you have any evidence that 5.4.2 has been destroyed?

A No, sir, I don't have anything on item 5.4.2, [3373] other than the return sheet showing that I returned the evidence on January 27th, 1994.

* * *

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF
COUNTY OF YORK	)	GENERAL SESSIONS
THE STATE	)	TRANSCRIPT OF RECORD
	)	90-GS-46-1196
-vs-	)	90-GS-46-1197
	)	90-GS-46-1198
BOBBY LEE HOLMES,	)	90-GS-46-1200
	)	MARCH 21, 2001
Defendant.	)	YORK, SOUTH CAROLINA

VOLUME X

BEFORE:

HONORABLE JOHN C. HAYES, III, JUDGE; and a Jury.

APPEARANCES:

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* * *

[State's Witness FBI Agent Lawrence Presley – Direct By Mr. Pope]

[3438] Q Also we had State's Exhibit 48, and I'm just going to go through these and ask you to look at them. State's Exhibit 48, which is Q-1, a white paper towel; State's Exhibit 49, which is Q-2, the Bugle Boy Jeans; State's Exhibit 50, which is Q-3, the blue and white shirt; and State's Exhibit 51, Q-4, the pink gown 1.2.

You received all of these, as far as the opportunity for your testing?

A Yes.

* * *

[3446] Q Again, has to Q-4, now, this is the sample that you received in August, I believe. Could you explain how that occurred, as far as receiving this sample?

A Yes, sir. One of the quality control measures that we actually used is at the beginning of the process, we used what's called a yield test gel, and it's the first really quality control measure that we used in our testing. And the purpose of that yield test gel was to determine if the DNA that we received at that point was of sufficient quality. And by that I mean was it in fairly good shape. Do you remember, I said DNA does degrade over time? There is no way to stop that degradation. Frankly, that's a reality of forensic samples. They do degrade over time. The question is does it degrade so far that I cannot no longer use it for to test and the sample.

Well, in this particular case we ran the test gel. The first test gel that we ran, I ran all the samples that you saw that were submitted on the test [3447] gel and we

found that K-1, the known blood sample from the victim in this case, was so degraded that we couldn't use it for further testing.

* * *

[State's Witness FBI Agent Frank Samuel Baechtel – Direct By Mr. Pope]

[3526] When I compare those types, the types are the same at all of those locations where I have a conclusive column. So my – I took – I have a sample K-4 was a representative of Mary Stewart – Q-4, I'm sorry.

Q You used Q-4 for your other comparison?

A Yes, as an alternate known.

Q In layman's terms, based on your professional opinion, K-1 and Q-4, are they from the same person?

A Well, they exhibit the same genetic characteristics, yes. I didn't carry out the calculation to determine if they meet our criteria for me to say they are exactly the same person, but my experience tells me they are.

Q Your results of using Q-4 and Q-1, could you tell us the results of that test?

[3527] A Yes, on Q-1, the DNA type from this particular item from that stain matches the types Q-4 of Mary Stewart.

Q Q-5, the underpants, could you explain what your results were there?

A Yes. The stain on these underpants was analyzed and it reveals a mixture of DNA, a mixer of DNA from a male and a female. And comparing that mixture with the

profiles of Mary Stewart and Bobby Holmes, indicates that those individuals are possible contributors of that – of the DNA in that mixed stain.

Q Can you explain the significance of that mixture and the match, what the numbers mean?

A As you may have already learned, once a match is declared, such as that, a second part of that is to give some quantitative evaluation of how often you would expect to find those DNA types in mixtures such as that. So I carried out what we call a mixture calculation, which I took into consideration the DNA types that were present, obviously from more than one person. I said it's a mixture. And I determined the probability of choosing someone at random, or someone's, obviously, since it's plural, more than one person, some individuals at random [3528] from the population who could have contributed DNA to that mixed stain.

Q And is that what the 1 in 72 million, is that –

A Yes.

Q That would be the probability?

A That particular number, 1 in 72 million, is that calculation for individuals from the African American – with an African American background.

Q As part of your protocol, do you actually do calculations for caucasian?

A I do, caucasians and two – a hispanic population.

Q So the odds of finding another set of contributors or number of contributors is 1 in 72 million. What does the 99.99999 percent mean? Can you explain that to the jury?

A Essentially what it means is 99.99999 percent of the population is excluded as to the possible contribute to that stain. And that's derived by taking the – actually the probability value. This number here is actually the actual probability divided into one, so I could say it's one in so many. But the actual probability number is subtracted from one and then multiplied by a hundred to get a probability of the exclusion value of [3529] 99.999.

Q So the percentage number is the number of people that would be excluded as being the donor to that?

A Potential donors, yes.

Q Could you explain to the jury the results that you found on Q-3?

A Yes, that's also a mixture of DNA. And neither the contributor of this sample, which we are discussing as Mary Stewart, nor K-2, Mr. Holmes, can be excluded from the mixture of DNA found on this particular item.

Q Q-6?

A Once again, this is a mixture of DNA from which neither Mr. Holmes nor Ms. Stewart could be excluded, meaning I saw no DNA types that would enable me to exclude those two individuals as possible contributors.

Q Were all of their DNA types accounted for in those mixtures?

A The mixtures of DNA that I have talked about can be accounted for. All the DNA types that were shown can be accounted for by both Ms. Stewart and Mr. Holmes.

Q You also indicated that you received K-3, a [3530] subsequent sample of Mr. Holmes blood?

A Yes, sir.

Q And you had the opportunity to compare that to K-2?

A Yes, sir.

Q What were the results of that comparison?

A They're the same profile at all the locations.

* * *

[FBI Agent Frank Samuel Baechtel –
Cross By Mr. MacDougall]

[3547] And if I could just finish out my hypothetical. As this inventory sheet is being prepared, presumably with the bags in place, and the officer preparing it and checking to make sure everything is there, no gloves, no hand washing, bag to bag to bag.

This creates, you would agree, an opportunity for the kind of contamination that the National Institute of Justice says shouldn't happen, the taking, the lifting of one very small, or perhaps, as you said, not visible with the naked eye, sample of DNA and transferring it from one to the other?

A The potential exists. Of course, I wasn't there, so I can't comment on whether anything happened, but sure.

Q I appreciate that, but your answer is potential for that kind of transfer is certainly there?

A Potential.

* * *

[3562] Q Has anyone at SLED, or anyone else, ever asked you, or, as far as you know, any of your colleagues to test the nightgown or any other samples for the presence of EDTA?

A No, never. I have never been asked to run that test.

Q And you haven't performed it on your own initiative?

A No, sir.

Q So sitting here today, whether there is EDTA present in any of those samples is unknown to us?

A Certainly unknown to me.

Q Right. And if it were present, that would be indicative of several things, one of which would be blood on that sample came from a tube that had EDTA in it?

A Possibly.

* * *

[State's Witness Dr. James Maynard –
Direct By Mr. Thompson]

[3614] A The reason she got the pneumonia was a severe brain injury, so the brain atrophied, the brain – the death of the cells in the brain, such that her body is not able to function and fight off the pneumonia. She would have been very, very improbable for her to get a staph pneumonia, unless she was debilitated, in a comatose condition, or in hospital or a health care facility.

* * *

[Dr. James Maynard – Cross By Mr. Nettles]

[3616] Q When you talked for a second about the sterile tubes that you put his blood in, how did you –

Let me put it to you this way. You checked the expiration date?

A Yes, sir, I did.

Q And that's how you determined that the vial was sterile?

A You would look for the expiration date. You would look in the tube to make sure that there is nothing discolored in there. Some tubes have a liquid or a fluid in there. Some do not.

Q Okay. But, I mean, so that's the two things [3617] that you would do to make sure that you had a sterile tube, right?

A Yes, sir.

Q One, look at the expiration date. And if it expires, you wouldn't have used it?

A You would – I would not use it, no.

* * *

[In Camera Hearing On Third-Party Guilt Evidence After Close Of State's Evidence]

[3642] THE COURT: How do you – this is not – he is available. He doesn't fall under (L)(4), because that deals with unavailable witnesses.

Now, I know Cooper dealt with mainly 104, but if footnote 4 they talk about 801. No, I got the wrong case.

In any event, the concern I have with 8 – I have taken so many notes I can't even find it.

[3643] 801(d)(1)(a), which is what I understand, that appears to be the situation that Judge Pleicones addressed in Cooper dealing with Gilmore's testimony overheard at a restaurant. And, for lack of a better way to say it, that's sort of the strawman approach; that is, you put – you put somebody up simply to knock them down, and I don't think that you can do that. How do you ever – how do you get the testimony in, I guess is what I'm saying? It doesn't come in under 804, because he's available. He's testified before. He was here last week and said he would be back.

MR. KRELL: Right.

THE COURT: So you have to go and say – it's in the definition of hearsay. It's not hearsay. So, therefore, he would have to be testifying at trial, subject to cross examination concerning the statement. So how do you get there?

MR. KRELL: Well, Your Honor, back in August, on August 14th, when we had our initial, for a better term, a third-party guilt hearing, on August 14th, 2000, and I can provide a copy of the transcript. I would have to make copies, Your Honor.

Mr. MacDougall was questioning Jimmy White at [3644] that hearing. And one of the questions Mr. MacDougall asked was, "So, you don't remember anything – I'm sorry, I'm quoting from page 302 of the transcript, Line 23 and 24.

Mr. MacDougall asked Mr. White, "So you don't remember what you did that night?

"A. The only thing I know, I left – I went to the Shack and I caught a ride from Clyde's, from the Shack and went to Clyde's. And then the only thing I know, it was a fight

over there. And they said the police was going to come, so all of us left and went back home. And I was at home asleep."

Now, earlier we had a discussion where, over the defense's objection, the State moved into evidence Bobby Lee Holmes' statement when the police walked into his room and said "there is blood on your clothes." And we just moved in the statement where Bobby Lee Holmes said "I got in a fight at Clyde's." We intend to put up, if allowed, Your Honor, Jimmy White to corroborate why Bobby Lee Holmes might have had blood on his clothes from a fight at Clyde's, Your Honor. It's the defense's timeline of events as to what happened, Your Honor. And for that reason, Jimmy White is plainly a relevant witness, unlike Gilmore in Cooper.

[3645] THE COURT: As to that issue.

MR. KRELL: As to that issue, that's correct, Your Honor.

And once we have a relevant purpose for putting up a witness, Your Honor, which we do, as to that issue, Rule 607 says – I'm sorry, Rule 607 says that –

THE COURT: You can attack the credibility of any witness, whether you put them up or not. But that's – you can't – you can't create – I mean, you have got to get there. You're jumping that first thing. It's got to be something to impeach.

MR. KRELL: Okay, Your Honor. Well, we would –

THE COURT: You are not going to impeach him on the Clyde's testimony. I mean, you could. If he comes in now and says he wasn't, you could impeach him on that.

But you can't – as I call it, the strawman. You can't sit him up to knock him down. You can't put him up – he's not hostile. I mean, it's not where you are asking the court to declare him a hostile witness because he doesn't fall under that category. Not an adverse party.

So, I can't figure out any way, and again, y'all are smarter than I am, but I have gone over these rules,

* * *

[3655] And finally, Your Honor, just in case it becomes an issue in your mind, the reason that there was no forensic evidence linking Jimmy White to the scene of the crime is because they did not test his hair against the blue tank top that was by the dog. They did not test his shoes against the shoe print, the mystery shoe print that we learned about earlier, and they did not test his clothes. And it's important to remember, Your Honor, they did test Bobby Lee Holmes' clothes. They did not test Jimmy White's clothes. Thank you.

THE COURT: As I said, this is a very difficult decision. I'm going to disallow the testimony. I do not believe under Rule 804(b)(3) or 801(d)(1)(a) that it can come in under either of those rules. And like in Cooper and the other cases, in Gregory, we sort of dance around these Gregory standard and other things, but in Cooper, which was a 1999 case, there is a statement dealing with the individual who wanted to testify about overhearing the statement, and I know it was only one, "but aside from Nelson's assertion there was no credible evidence linking Gilmore to the victim's murder." So I know when we [3656] talk about the trustworthiness of the statements, that's one issue, but here there is no evidence that is to clearly

point out that Mr. White was guilty of the crime. And that under the two rules that it can't come in evidentiary-wise, but also substantive-wise as to third-party guilt.

MR. KRELL: Your Honor, I just want to make sure that the record is straight. Your holding is that Rule 804 and 801 are essentially trumping the Constitutional Rights of Bobby Lee Holmes, is that right, under Chambers v. Mississippi?

THE COURT: Well, I'm just saying those are the rules and our court has interpreted them, and particularly that they are the Rules of Evidence. I'm not going to say they are trumping anything. I'm just making a ruling.

* * *

[Defense Witness Bobby Lee Holmes, Jr. – Direct By Mr. Nettles]

[3661] MR. NETTLES: To provide sworn testimony from the defense, the defense calls Mr. Bobby Lee Holmes to the stand.

BOBBY LEE HOLMES, JR., having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. NETTLES:

Hello, Bobby.

A How are you doing?

Q Did you rape and beat Ms. Stewart?

A No, I did not.

Q Were you in the apartment complex on California Street the night that she was beaten?

A No, I wasn't.

Q How did your blood – how did her blood get on your shirt?

A I don't know.

Q How about your fingerprint, Bobby? You have [3662] heard they say your fingerprint is on the inside of her apartment. How did that happen, Bobby?

A I don't know how that happened.

Q How about the fibers, Bobby, how did that happen?

A I don't know.

Q Tell the jury what your name is.

A Bobby Lee Holmes, Jr..

Q Where were you born?

A York, South Carolina.

Q Bobby, do you have a criminal record?

A Yes.

Q Share it with us.

A I had caught a charge while I was in the SCDC waiting on this trial for throwing bodily fluids on a C.O..

Q And that's – caught a charge, that means you pled guilty?

A Yes, sir.

Q Did you go to a club the night of 12 – of December 31st of 1989?

A Yes, sir.

Q. What's the name of that club?

A Clyde's.

Q Who did you go with?

[3663] A I went with Terrence Digsby, Bobby Hemphill, Bobby Crockett, and another dude. I don't know his name though.

Q How long did you stay there?

A Basically until it closed.

Q After it closed – well, let me ask you this. While you were there, did you drink anything?

A I had a little to drink.

Q Did you get drunk?

A Not drunk, but I had a little to drink.

Q Would it be safe to say that you were not sober?

A Yeah.

Q Were you using any drugs?

A No.

Q Where did you go from Clyde's?

A When we left Clyde's and stuff, I had went to Townhouse Apartments, to my cousin Tonya Jamison's house.

Q How long did you stay there?

A We stayed there – we stayed there – we was just talking and stuff. We stayed there for a little bit. I'm not sure about the time, though.

Q Did you have a watch?

A No.

[3664] Q Where did you go next after you left Tonya Jamison's?

A After we left Tonya Jamison's house, I went over to Cannon Court where my sister stayed at.

Q What's her name?

A Tina McCombs.

Q And at Cannon Courts, your sister's house, did there come a time that maybe some people got a little too loud?

A Yes, sir.

Q Were you one of those – were you in that group of people that got a little too loud?

A Yes, sir.

Q Were you one of the people that got too loud?

A Yes, sir.

Q. What happened? Did something – you know, did a time come that you – the police came because y'all were a little too loud?

A Yes, sir.

Q. Who came?

A An officer, Sergeant Grady Harper, I think.

Q. The man who testified in here at the beginning of your trial?

A Yes, sir.

Q And when he came, did he tell you all to leave?

[3665] A Well, he came and he was talking to us, and, you know, basically said we had to leave and stuff, yes.

Q Okay. Did you leave?

A Not –

Q Right away?

A Not at the time, no, sir.

Q Was there an event that ultimately caused you to leave?

A Well, I ran, you know.

Q But did more police officers come?

A Yes, he had called for backup and stuff, yes, sir.

Q. Whenever you heard that, what did you do?

A Well, that's when I ran.

Q. Why?

A I did not really want to go to jail.

Q. Where did you run to when you ran from Mr. Grady Harper the first time?

A Well, I ran around the apartment building. I jumped over a – it's like a brick wall in the apartment complex, and I went over like – I was still in the apartment complex, but it was like I went around another building and I basically was hiding behind that building.

* * *

[3666] Q Bobby, I'm showing you something that was earlier marked Defense Exhibit 35, okay?

A Uh-huh.

Q Is that the wall that you jumped?

A Yes.

Q And when you jumped that wall, where did you wind up?

A On the other side of it. I just went like around the building and stopped.

Q On the other side of wall, did you wind up in some peoples back yard?

A No, I was still in the apartment complex.

Q Okay.

A Like I say, I just ran to like to the other side of – across the street from the apartment complex.

Q Now, what did you do there?

A Well, once I realized that they wasn't chasing me, I just stood there. I could see them from where I was. I just sat there and watched them. When I seen them leave, I went back over there.

[3667] Q When you went back over there, did you bump back into a friend of yours?

A Yes, sir, I ran back into Terrence Digsby.

Q Terrence Digsby. When you saw Terrence Digsby, what did you do?

A Well, I was on my way back over the wall and – I was sitting on top of the wall and he pulled out and I flagged him down and he stopped.

Q What did you do then?

A He got out and he just told me to get in the back seat, so I jumped in the back seat.

Q Did you sit up in the back seat?

A No, I laid down in the back seat.

Q Did the – what happened? Did y'all – I mean, I guess y'all pulled off then, right?

A Yes.

Q What was sort of the next big thing that happened in your adventure?

A Once we got like to the top of the street coming into Cannon Court, Terrence just went – he like went left.

Q Okay. And what happened? Did he get to make that left turn?

A He made the left turned, but he said he seen the police, so that's why he made the left turn [3668] instead of going right, and that's when a car got behind us, and he kept telling me to lay down, lay down, there's the police.

Q Did you lay down, lay down?

A No, I looked up.

Q When you looked up, what happened?

A That's when the blue lights came on.

Q When the blue lights came on and what happened after that?

A Terrence – we had done went down the street a little bit and we turned beside this big church.

Q Okay. And what happened then?

A I jumped – I jumped out the back seat and ran.

Q And why did you run?

A Because the police.

Q And did Terrence run?

A I'm not sure. I was gone.

Q Where did you go to then? Is this the – hang on for just a second.

I'm showing you what's been marked as Defense Exhibit 32. Is this the church?

A Yes.

Q This is the church that you – where they stopped and you jumped and ran out?

A Yes, sir.

[3669] Q Okay. And how far is that from where your sister lives?

A It's not that far.

Q I mean, you hadn't gotten very far, had you?

A No, we hadn't gotten very far.

Q So you ran. And where did you go then?

A I ran around the church, and basically just like once I came back around the other side of the church, it's like some houses. I ran across the street behind the houses into the woods.

Q Okay. And then once you got in the woods, what did you do?

A Basically I had fell down, so I just laid there because I could hear the police.

Q Did you have to run through any bushes and briars?

A Yes.

Q Did you get cut up at all?

A I got scratched up pretty good.

Q When you fell, did you get hurt?

A I hurt my arm, yes.

Q Show us where you hurt yourself. Do you still have the scar?

A Yes, I have got a scar.

Q Okay.

[3670] A It had like – it had nicked myself.

Q Right there. Was it bleeding?

A Yes.

Q So you – how long did you – you fell or you laid in the woods?

A Yes.

Q How long did you lay there, do you know?

A Well, I don't know. Like I said, I never had no watch on, so I don't know exactly what time it was, but I had seen like another police car come.

Q Come to where?

A Come down there to the scene where –

Q The church was?

A Yes.

Q Okay.

A And I seen them riding up and down the street like flashing big lights behind the houses and stuff.

Q Right.

A And next thing I know, I seen like some yellow lights flashing, and that's when I realized it was a wrecker coming.

Q A wrecker coming to where?

A To tow the car in.

Q Okay. And that would have been whose car?

[3671] A Terrence Digsby's car.

Q So whenever you saw the wrecker came and towed Terrence Digsby's car away, what did you do then?

A I was still laying back, sitting back there in the woods now. And when I seen the wrecker tow the car away, I was – I still see Grady Harper's car. He had like lights on in the inside like he was doing a report or something.

Q Right.

A And I seen him turn the lights off. I seen him leave. And I came out – came out of the woods.

Q Where did you go then?

A I was on my way, like coming out going back to Cannon Court.

Q And who lived at Cannon Court?

A My sister.

Q Is that where all this disturbance thing started?

A Yes.

Q Okay. You went to Cannon Court, and did you – whose house were you trying to go to in Cannon Court?

A My sister Tina.

Q And why did you want to go in there?

A Basically I wanted to go get out – you know, I [3672] was stranded, so I just wanted to go there and lay down and go to sleep.

Q Were you also trying to get some help for your cut?

A Yes.

Q What else did you want?

A I had asked for some water.

Q Did she let you in?

A No, she said the police had said they was going to come back and check and if I was there, she was going to be locked up too, so she – she was afraid to let me in.

Q Now, so she wouldn't let you in. Where were you headed now?

A Basically my next option was to go to my father's house.

Q And where does your father live?

A He stays in the valley.

Q In the valley. Now, that's a road, right?

A Yes.

Q Valley Road?

A Yes.

Q I'm showing you what's been marked Defense Exhibit 26. Is that your father's house?

A Yes.

[3673] Q That's your father's house on Valley Road?

A Yes.

Q Okay. Did you get there?

A Well, as I had –

Q Did you ultimately get there?

A Yes.

Q Is this where you were arrested?

A Yes.

Q Now, so you left your sister's house going to your daddy's house on Valley Road?

A Yes, I was on my way out and that's when I had ran into the police car again.

Q Okay. You ran into a police car again?

A Yes.

Q What happened then?

A Basically I just flagged them down and they got out and they was talking to me. I said I was sorry, I didn't want to –

Q Was Terrence Digsby there?

A He was in the back seat.

Q The back seat of the police car?

A Yes.

Q He was already under arrest?

A I reckon. He was in the back seat of the police car.

[3674] Q Okay. And so what did you tell the police then?

A I was just telling them – they were talking to me to come and let's talk. I said I don't want to talk. I don't want to go to jail. You know, I apologize for the argument I

had got in with the other officer, but I didn't want to go to jail, and that's when they like tried to come at me and I just ran again.

Q Okay. And where did you run to?

A I went like – I was down by that church again. I was on the same side of the church. It was like a little pass. I just ran up through that pass.

Q And where did that put you out at?

A That put me out like the street over.

Q Okay.

A And I had – I had came to this like trailer.

Q Who lived there?

A I don't know. I done forgot it. I don't know her name.

Q Does Ms. Talbert live there?

A Yes.

MR. POPE: Your Honor, I'm going to object to the leading. I have tried to –

THE COURT: Rephrase your questions.

[3675] BY MR. NETTLES:

Q Who lives there?

A Ms. Talbert.

Q When you got to Ms. Talbert's house, what did you do?

A I knocked on the door and she came to the door and –

Q What did you ask for?

A Some water.

Q Did you get any?

A Yes.

Q And how long did you stay there?

A Basically I just stayed there long enough to try to let the police scan the area and to move on. That's all.

Q And did you leave there?

A Yes.

Q Where did you go from there?

A I left there and I had like went to the top of the street she stayed on. It's like a car wash and washerette.

Q Right.

A And I had like walked around back into the car wash part, and I – like I say, I don't know the name of the street it's on, and I basically had went [3676] straight down that street.

Q Straight down that street to where?

A Like I said, straight all the way down and I came out to like a – it's a dirt road.

Q Okay.

A And it's like a railroad track, and I basically got on the railroad track and I came out beside like – it's a video store.

Q Okay.

A And it's another washerette. I went behind there and I walked right through by the police station.

Q And then when you walked through the police station and you went by there and then where did you go from there?

A Once I walked through the back of there, I ran across the street and came out in the back lot.

Q In the back lot?

A Yeah, once you like cross the street of the police going –

Q Is that where city hall is?

A Well, it's city hall there, I reckon. That's that police station. I'm not sure.

Q Okay.

A But I just went on and walked across the street [3677] from there and ran across the street.

Q Did you ultimately wind up on what's called main street?

A That's what I call the main street.

Q What's the real name for that, do you know?

A I think it's Congress Street, but I – I just say it's the main street, because it leads through town.

Q When you got to the main street, did you turn right or left?

A Left.

Q And you turned left and you went down main street?

A Down main street.

Q Or Congress Street?

A Congress Street, yes.

Q At some point did you pass California Street on your right?

A I had to pass it to go to the valley. That's the direction that I'm going in.

Q When you got to the corner of Congress Street and California Street, did you turn right and go down California Street?

A No, I kept running straight, going straight to the valley.

[3678] Q And when you got to the valley, what did you do?

A I went to bed.

Q Well, how far is it from downtown to the valley?

A I really don't know.

Q Do you know how long it took you to get there?

A Well, actually I was dipping and dodging. So, you know, if I see a light come along, I just jump out of the

way, so I really can't say. I don't know. I didn't have a watch on.

Q Did you ever go by a place called Williams Liquor Store?

A Yes, I went past that and crossed the railroad tracks and through the pass and came out on Valley Road, yes.

Q And then were you ultimately arrested?

A The next day.

Q The next day.

A Yes.

Q Once you got to that house, did you ever leave there?

A No.

Q Did you receive any phone calls when you got home?

[3679] A My sister Tina had called me, but she was making sure I was alright and stuff.

Q Is that the same Tina that had been at the house where the disturbance was?

A Yes.

Q I'm going to ask you one last time, Bobby. Did you do this crime that you are charged with?

A No, I did not.

Q Thank you.

THE COURT: Please answer any questions the State has.

MR. POPE: Beg the court's indulgence.

(off the record)

(back on the record)

CROSS EXAMINATION BY MR. POPE:

Q Mr. Holmes, Mr. Nettles was asking you about the valley?

A Yes.

Q That's a road, but that's – that's what they call a community down there too, is that right?

A Yes.

Q I want to go back through. I was trying to take notes as I went through. If I say something different than what you said, you stop me and correct me, okay?

[3680] A Okay.

Q You're at your sister's house on Cannon Court?

A Yes.

Q Is it Tina McCombs or –

A Tina McCombs.

Q And you got into an argument with her?

A Brother-sister argument, yes.

Q It was enough that the police came down there, right?

A Well, me and her wasn't arguing when the police had got there. It was like me and Bobby Hemphill was just horseplaying around. Well, I was horseplaying around and he wasn't.

Q Was he mad?

A Yes, he was mad.

Q Were you winning?

A Not necessarily I was winning. I was just – you know, I was just horseplaying with him.

Q What do you mean by horseplay?

A Boxing, you know. We was just wrestling and stuff.

Q And then the police came down there?

A Yes.

Q And you talked to the police. Do you think it was Grady Harper?

[3681] A Yes, that's who it was.

Q Now, you said that – and then he was going to put you under arrest, wasn't he?

A First when he came down, they had asked us to leave, and me and him got into an argument. And the next think I know, he called backup. They was going to arrest me.

Q You told him he wasn't big enough to put you in jail, didn't you?

A I don't remember what I said, but –

Q Something to that effect?

A I don't remember what I said.

Q And you ran from down there because you were afraid they were going to put you in jail, right?

A Yes.

Q Okay. You jumped the fence behind the apartments and ran back behind the other apartments, is that right?

A Yes.

Q Then you kind of – you kind of loop around, right? Then you came back out and that's when you saw Terrence and flagged him down?

A Yes.

Q And then when y'all turned out to the left, that's when the police got behind you?

[3682] A Yes.

Q And when you got down to the big church, that's when Terrence pulled over and you jumped out and ran again, right?

A Yes, sir.

Q You ran around a church and into the woods there?

A Yes.

Q You stayed back there until the police left?

A Yes, after I seen him, that's when he left.

Q And you saw them tow the car away and everything, is that right?

A Yes, I seen all that.

Q And once the car was towed away and everybody was gone, then you came back out, is that right?

A Well, I seen – first, like I said, I seen like Grady Harper had his light on and he was doing a report or something. He cut the light off and pulled off, then I came out.

Q And when you came out, that's when you talked about that you apologized to the officers?

A No, I had went back to Cannon Court. I had done came away from Cannon Court before I ran into them again.

Q So you went back to Cannon Court twice now?

[3683] A I had went back to my sister's house, yes.

Q And it was that time that she wouldn't let you in?

A Yes.

Q And once she wouldn't let you in, what did you do?

A Like I said, once I couldn't get in, so it was my decision to go to my father's house.

Q And that was down in the valley, right?

A Yes.

Q You went the back streets until you got into the back lot?

A Basically, yes.

Q Now, the back lot, that's kind of like all that parking lot stuff that's behind the buildings on that side of Congress Street? Is that what you call the back lot?

A Well, that's what I have been calling it since – that's the only name I had knowed it by.

Q Kind of a big different parking lot, you got some buildings here and there, and it's the back of the other buildings, is that right?

A Yes.

Q And let me just make sure I have got it right. "I left down from there and I was going to the [3684] valley. I went to the back streets until I got to the back lot." Is that right?

A Yes.

Q "I went through an alley and came out on main street."

A Yes.

Q "I then went straight up main street until I got to the corner where Williams old liquor store is."

A Yes.

Q "I then went down a path over to Valley Road." That's the one that comes out in front of Galilee Church, right?

A Yes.

Q "I then went to my father's house at 124 Valley Road," is that right?

A Yes.

Q Okay. "I got home about 5:00 or 5:30 in the morning." Is that right?

A I don't – I'm not sure about the time. It was – if – I'm not sure about the time.

Q Let me ask you this. When you got home, was it still dark?

A It was coming light.

Q But you were able to still see – you were [3685] talking ducking and dodging from cars. You were still able to see headlights and stuff, so it wasn't light yet?

A Yes, I could still see car lights and stuff like that, yes.

Q It's really – by then it's kind of heading toward morning, but you would agree with me it's still in the nighttime at that point, right?

A Yes.

Q And I think your testimony, you didn't go down California Street, and you hadn't been there in over a week, is that right?

A Yes.

Q And you had been on California extension, but that's all the way down there where Clyde's is at?

A Exactly.

Q And you did not know Mary Stewart?

A No, I did not.

Q Okay. And you don't know where she lived?

A No, I did not.

Q You had never been to her house?

A No, I did not.

Q And you have never been in her house?

A Exactly.

Q And when you walked home, you were by yourself [3686] and nobody was with you?

A (shaking head yes)

Q Is that right?

A Yes.

MR. POPE: Beg the court's indulgence.

(off the record)

(back on the record)

BY MR. POPE:

Q Mr. Holmes, I will have you look at State's Exhibit No. 28. Do you remember when you gave that to Bruce Bryant?

A Yes.

Q Okay. And is that accurate, as far as what you did and what happened that night?

A Yes.

Q Okay. Thank you, sir.

A All right.

Q As a matter of fact, you talked to them the day that you were arrested and gave them a statement the next day too, right?

A I don't remember talking to them the day before. I don't remember that.

Q You don't remember talking to Bill Mobley and Boot Smith and they recorded it and you are talking about basically the same stuff and they were asking [3687] you –

A I don't – I don't remember that.

Q You don't remember talking to them?

A No.

Q You're not denying that? You just don't remember?

A No, I'm just saying I don't remember. I'm not denying it. I just don't remember.

Q Now, that night when you left there – I mean, when you were out that night, you had on your black hooded jacket, is that right?

A Yes.

Q Had on your stone washed jeans? We seen those, right?

A Bugle Boy.

Q You had your underwear on that you had on when they come and wake you up the next day, is that right?

A Yes.

Q Had on that kind of a tank top kind of muscle shirt or something that's –

A I did not have that on.

Q You didn't have that on then?

A No.

Q So you were just wearing your sweat shirt?

[3688] A Yes.

Q But the blue and white shirt that they got there, that's your shirt?

A Yes.

MR. POPE: Beg the court's indulgence.

(off the record)

(back on the record)

BY MR. POPE:

Q Mr. Holmes, basically once you ran from the police, in your words, you were dipping and dodging, trying to avoid being seen, right?

A Yes.

Q You went to your sister's house and knocked on her door trying to go in there to find a place to be, right?

A Yes.

Q When you left there, you went – and you didn't say this in this statement, but you said a minute ago you went to some lady's house and knocked on the door?

A Yes.

Q Okay. And you didn't tell the police that back then, did you?

A Well, at the time, he basically – when they had locked me up, they hadn't locked me up for no [3689] murder. They came and locked me up for a fight. So all I was thinking about was a fight. That's all I knowed about was the fight.

Q Okay. So when they had locked you up –

A They came –

Q – you told them – you told them – they asked, said where had you been, you told them exactly where you had been, but suddenly now that it's a murder, you are telling me about this lady?

Q Okay. And you didn't tell the police that back then, did you?

A Well, at the time, he basically – when they had locked me up, they hadn't locked me up for no [3689] murder. They came and locked me up for a fight. So all I was thinking about was a fight. That's all I knowed about was the fight.

Q Okay. So when they had locked you up –

A They came –

Q – you told them – you told them – they asked, said where had you been, you told them exactly where you had been, but suddenly now that it's a murder, you are telling me about this lady?

A I'm saying then the question was asked. At the end of the statement it was asked do you know Mary Stewart. I said no.

Q Oh, I'm sorry. I didn't mean to confuse you. I was talking about the other lady Mr. Nettles –

A I know who you were talking about, but I'm saying at the time it wasn't important to me, because when they came and talked to me, said they wanted to take me down to the station to talk to me, it was about a fight. It wasn't about no auto theft. It was about a fight. I'm going to ask you questions about a fight last night.

Q They actually had arrest warrants for you for an auto theft, didn't they?

A I didn't see no warrants.

Q Didn't they serve them you on down there?

[3690] A They didn't serve no warrant. When they came to me at my house, it was about a fight.

Q Well, when they came to your house, the truth of the matter is you were – they were talking to you about the warrants, because you were saying who you were going to get for ratting you out.

A It was about a fight. That's what it was about, a fight.

Q That's what you –

A It wasn't about no car theft. It was about a fight.

Q Okay. And you were angry at the time that they were there about that fight?

A I'm saying, when they came – when they came to me, I'm saying when they said we want to talk to you about a fight, I'm saying how did I get involved with a fight.

Q Okay.

A And that's what they was talking about, a fight.

Q And they talked to you about a fight?

A Exactly.

Q And at that point you told them about the blood on your shirt?

A I didn't tell them about nothing, because they [3691] took me away from the house. I was at the police station about an hour. They stayed there at the house and took things out of the house.

Q Okay. What about the fight at Clyde's? Did you tell them about the fight at Clyde's?

A No, they came and asked me about a fight at Clyde's.

Q Did you tell them about the blood on your shirt coming from Clyde's?

A I didn't tell them about nothing. I was at the police station. Bill Mobley and Boot Smith stayed down at my dad's house and they took all that stuff out. I was at the police station. I was down there for about an hour before they even came down there and talked to me.

Q Now, the only thing they got out of your house was your blue shirt and that other black sweat shirt that doesn't have the hood on it, is that right?

A That wasn't – that wasn't even my sweat shirt.

Q That's not your sweat shirt?

A No.

Q The one that doesn't have the hood is not yours?

A That was my father's sweat shirt. That's his work sweat shirt.

[3692] Q So yours is the one that you had on?

A That's right, exactly.

Q So basically the stuff you had on – your underwear, your pants, all that stuff – was yours, and you took that to jail with you because you wore it, right?

A Yes.

Q Okay. And so the thing they recovered that was yours at the house was the blue and white shirt at the foot of your bed, right?

A I don't – like I said, I don't even – I didn't know what they got out of the house.

Q I'm saying that's your shirt? You have seen the shirt.

A That was my sweat shirt – that was my tank top.

Q Kind of a slick tank top, right?

A Yes.

Q I want to go back to this lady. Tell me about the lady that you knocked on the door and got the water.

A I don't – like I say, I don't know her name, but I had been there to her house before.

Q Where does she stay?

A She stay like – it's hard for me to describe. [3693] Just – it's over there by the Cannon Court area.

Q How did you decide to knock on her door in the middle of the night?

A Because when I seen the light on in the trailer. When I was coming through the path, I seen the light on?

Q You went to that door?

A Yes.

Q Was that after you had left your sister's house?

A Yes.

Q So you went to your sister's house and she wouldn't let you in. And then you went to this lady's house and knocked on her door and what happened?

A She let me in.

Q She let you in?

A Yes.

Q Did you see her husband there too?

A I seen where – I would say he was in bed, but she had known me, because I had been there with my cousin before.

Q Right.

A And she was asking me what I was doing out that night. And like I said, I was like, you know, I had [3694] been in a fight, you know, I was just like trying to kill some time.

Q Okay. But you wasn't trying to kill some time. You was trying to duck and dodge and get to the valley, right?

A Well, once – like I said, I had just left the police. The police was –

Q So it was good thing to get in the door somewhere else, right?

A No, I'm not saying it was a good thing. I'm saying when the police had left from over there on the other street, I figured they was coming around there. Since I knowed her, I figured I would go in there. And if they come, they would just scan through, and when they see I wasn't out there, they would move on. That's enough time for me to get me some water and move on and catch my breath.

Q Did you go to get water or did you go to hide?

A Well, I got water and caught my breath.

Q And when you went in her house, you said her husband was laying there in the bed?

A I don't know. He was in the room. I don't know if he was her husband or not.

Q Yeah, there was a man there?

A Yes.

[3695] Q Okay. And either laying on the couch, or laying on the bed, or something?

A He was in the bedroom.

Q Okay. He was in the bathroom?

A Bedroom.

Q Bedroom. I mean, you could see him, is what I'm getting at. It's a trailer?

A I had hollered at him and spoke to him on the way out of the door.

MR. POPE: Beg the court's indulgence.

(off the record.

(back on the record)

BY MR. POPE:

Q All right. Mr. Holmes, so you left there – and, again, you didn't – I apologize. I'm getting confused.

You didn't tell the police about going to her house, but you left her house and basically then you are back on track with this statement, right, about cutting up and cutting through the back lot and going up?

A Yes.

Q So you're not denying when you went home, that you came right up there at the top of the California Street at that time?

[3696] A That's the way I had to go to get to the valley.

Q Now, when you went by there, a minute ago you said that you didn't know what time, but you told the police about 5:00 or 5:30, is that right?

A I didn't tell them. They – they made that suggestion you think it was this time. I said basically.

Q I got you. So they put the 5:00 or 5:30. You really don't know what time it was?

A I don't know what time it was.

Q Now, I think you said this was the statement. I want to ask you one thing. Down there – you see up at the top when the times – where you got the statement and where it says the times, like – what is it, like 1:10, or something like that? You see up at the top?

A Yeah.

Q That's – that's – that's right, they talked to you like right after lunch?

A I'm not – I thought it was later than that.

Q Later in the day?

A Yeah.

Q And then it was after that that they served these warrants on you for all this stuff with Mary [3697] Stewart, is that right?

A I don't know. The only thing I remember, that's when I received the grand larceny auto theft warrant.

Q Do you remember that day on January 1st, that you – as a matter of fact, Bruce Bryant was the one that served the warrant on you, wasn't he?

A I don't know. I don't remember who all.

Q But you remember it was that afternoon after you talked to them? They didn't put you under arrest for this and then go start talking to you, did they?

A I'm saying I don't remember being served all like I had when I was in the county jail all them years, all they had on the computer was grand larceny auto theft. That's all they had in my file and everything, grand larceny auto theft.

Q At the county jail?

A Yes.

Q But you are aware that you were arrested on warrants at that time, that afternoon?

A Well, I am now.

Q Okay. Certainly today, but back then you were that afternoon, right?

A No, basically that afternoon I didn't really [3698] know I was charged for Ms. Stewart's stuff until they had moved me to the county jail and the dude asked me what my name was. When I told him, he handed me the newspaper and said you made the front page. And that's when I had realized. That's when I decided to call my mom.

Q I got you.

Mr. Holmes, again I have been confusing the issue a little bit. On the 31st, that day when they have came and picked you up down at the valley?

A Yes.

Q On that day they served warrants on you for grand larceny auto, right? Two warrants, right?

If you need – would it help you to look at them?

A I'm saying – you are saying they served. I don't remember no warrants being served. The only thing I remember they coming and asked me about a fight.

Q Okay.

A That's what I went to the police station on about a fight at Clyde's the night before.

Q I understand that. And I'm saying once you got to the police station – are you with me there?

A Yes.

[3699] Q Dale Edwards come and rode you to the police station, right?

A Yes.

Q Okay. And once Dale Edwards took you to the police station, they served the warrants for the grand larcenies on you there, is that right? Do you see on the top left-hand corner where it says served on Bobby Holmes this day and it's got a signature?

A Yes.

Q Who served those warrants?

A I think Martin, but I'm not sure.

Q And then after that, on the next day, after you talked to Sheriff Bryant – after you talked to Sheriff Bryant, then they served them warrants on you for the robbery and the sexual conduct and the burglary, is that right? Again, would it help you – do you see up in the left-hand corner where it's got Bruce Bryant?

A I see the name, but I don't know – remember who served them on me.

Q And you don't remember who served them?

A No.

Q It could have been Bruce Bryant? You just don't remember who served them on you that day?

A It's been almost twelve years ago. My mind has [3700] done been through a lot now.

Q But you remembered the lady and drinking the water now that you didn't remember back then, right?

A I'm saying –

MR. NETTLES: Objection, Your Honor. First of all, that mischaracterizes what he said.

THE COURT: Please rephrase your question.

MR. NETTLES: I'm going to ask that that question be struck.

THE COURT: All right. Just disregard that question. I don't believe there was an answer, but just let's go on.

MR. POPE: This is cross examination, Your Honor.

THE COURT: I understand that, but let's – he says you mischaracterized it.

MR. NETTLES: Your Honor.

THE COURT: Let's let the jury step out for just a minute.

MR. POPE: We will see.

(The following takes place outside the presence of the jury panel)

THE COURT: Before we do anything, read back the question.

(Whereupon, the requested testimony was reread [3701] by the court reporter)

THE COURT: I presume that you – you said it's a mischaracterization?

MR. NETTLES: Yes, sir. I mean –

THE COURT: Do you feel concerned it's argumentative?

MR. NETTLES: Well, it's argumentative and it mischaracterizes the evidence.

Mr. Holmes – I know Mr. Pope doesn't like the answer. I'm getting ready to have to object as asked and answered. Mr. Holmes said – he asked him did you –

MR. POPE: Your Honor – maybe this is one – I don't know how you accomplish this, but he can't coach a witness now.

THE COURT: Well, I'm not going to – let's just –

MR. NETTLES: He's asked – he's answered that question. Just let me put it that way. He answered it.

We can do this at the bench, Your Honor, if –

THE COURT: I want everything on the record.

MR. NETTLES: They asked him that question twice now. Okay. It's been made clear that because of the context that the question was placed, that he [3702] did not feel it was relevant and – I mean sufficently –

We can take Mr. Holmes in the back, if they would like, but, I mean, he's asked his question. It's been answered. And now he put in a question attempting to characterize, first of all, things that aren't in the facts, and secondly, to mischaracterize the small fact that is in the record. And that is the question of so do you remember the water lady – I mean, you don't remember the what time, but you don't remember – you didn't remember the water lady back then. That's not what he said. What he said was what he previously said. I want the record to be clear I'm being – I'm attempting to be mildly obtuse in attempt to not speak in front of my client.

THE COURT: Why can't we just move on? Isn't that the best way to do?

MR. POPE: Yes, sir. I just want to make sure I have a full opportunity. When we crossed the DNA people, we asked the same question fourteen times. I just want the opportunity for full cross. And I think I would be entitled to that, Your Honor.

The fact that Mr. Nettles characterizes something, that's a straightforward cross [3703] examination question. It's inconsistent between what he said the first time and the last time, and I'm – I'm able to point that out, Your Honor.

THE COURT: You are saying the last time. What do you mean by the last time?

MR. POPE: He gave a statement to law enforcement in which he did not say that. He has testified that he did say that. And I was simply pointing that out, Your Honor.

MR. NETTLES: The problem is he never said I don't remember going to the water lady. What he said was what he said.

THE COURT: Yeah, I understand.

You are saying not that he was asked – he obviously wasn't asked, because he gets water somewhere, but the fact that it's not in the statement.

MR. POPE: Is inconsistent with what he's saying today. He told me –

THE COURT: It's not inconsistent. It's just different, because he didn't say – I mean, he – there is nothing about the water lady, that I recall in the statement, is there?

MR. POPE: No, sir, there is not.

THE COURT: Okay.

[3704] MR. POPE: But they – he told them directly where he went. He didn't tell them anything about going to the water lady.

THE COURT: Well, we run into this all the time in criminal and civil trials about examination on the – on the stuff that's – that the statement is silent on. And you – you can't examine him in that fashion, in my opinion, well, you remember it now but you didn't remember it now. You are just saying you are testifying to that – the fact that it's not in the statement doesn't mean –

MR. POPE: Well, that's for Mr. Nettles to argue.

THE COURT: Well, is it so crucial that we can't move on to something else?

MR. POPE: It was obviously crucial enough to ours that they interjected it.

MR. NETTLES: I don't want to be disrespectful, Your Honor –

THE COURT: No, I understand. Well, I'm going to ask that that question and then you go onto something else.

MR. POPE: Your Honor, could I have a brief break –

THE COURT: All right.

[3705] MR. POPE: – before we start back?

MR. NETTLES: Your Honor, I vehemently disagree with that. I mean –

THE COURT: Well, is it –

MR. NETTLES: He wants to have a break, he's got his chance to do his cross examination. And he, you know, goes –

MR. POPE: Your Honor?

THE COURT: You need to use the facilities?

MR. POPE: I would just like a brief break, Your Honor. We have stopped at least three of the State's witnesses, I know of, for Mr. Nettles to stop and start. While we have got a jury out, it would be a good time. I

would like a break to maybe collect my thoughts and maybe do a quicker job.

MR. NETTLES: But –

MR. POPE: But he can object to that, but he's darn sure done it three times earlier, Your Honor.

MR. NETTLES: I never asked for it.

MR. POPE: Well, I mean, Your Honor –

MR. NETTLES: I never asked for it. And, I mean, the court asked for that at one point.

I am now being – I am now put in the position because he wants me to pay for objecting. And the penalty that I'm having to pay for objecting is [3706] sending the jury out so he can go collect his thoughts, a solicitor who is supposed to have tried umpteen hundred cases, and get prepared for something. He's the person that called this case in here today. And if he's not prepared to cross examine Mr. Holmes, it shouldn't come at the cost of me making an objection.

MR. POPE: Your Honor, no different than when I objected and I paid the cost, that I said let's finish the cross, and the court again let Mr. Nettles stop. And I think even we went into the next day and he finished on Captain Mobley, Your Honor. I'm just asking for equity. It can't be different –

THE COURT: Well, I'm going – we are going to. We will take a short break.

MR. POPE: Thank you, sir.

THE COURT: Mr. Holmes, you can step back into the holding cell.

Tell the jury that if they want to take a quick smoke break, this would be a smoke break.

(Proceedings recessed)

(Proceedings reconvened)

THE COURT: Yes, sir.

MR. NETTLES: Thank you Your Honor.

[3707] I would like just to place on the record that – no, I think I would just like to call attention to the record that every single step when I have asked for a continuance in this case, Mr. Pope's position has always been we're ready, we're ready, we're ready, we're ready, let's go, let's go, let's go, let's go. And I have had to fight tooth and nail to have the time to get ready, and I appreciate the court allowing me that.

He controls the docket by statute. This case has been pending for a long time. I find it fundamentally unfair that the solicitor takes the opportunity for when I make a valid objection and then ask for time to go cross examine a man who has had pending – charges pending against him for ten years. I find what has transpired here fundamentally unfair, Your Honor. I would ask that the remedy be that his cross examination be terminated at this time.

THE COURT: I deny that.

Are you ready?

MR. POPE: Yes, sir.

THE COURT: All right. Bring in the jury. (The following takes place in the presence of the jury panel)

[3708] THE COURT: All right.

MR. POPE: If it please the court, Your Honor.

BY MR. POPE:

Q Mr. Holmes, you have indicated on your record from August 31st of 1999, you had a conviction for throwing urine on a guard, is that correct?

A Yes.

Q Thank you.

MR. POPE: I have no further questions.

MR. NETTLES: I have no further questions.

* * *

STATE OF SOUTH CAROLINA)
) IN THE COURT OF
) GENERAL SESSIONS
COUNTY OF YORK)

THE STATE) TRANSCRIPT OF RECORD
) 90-GS-46-1196
-vs-) 90-GS-46-1197
) 90-GS-46-1198
BOBBY LEE HOLMES,) 90-GS-46-1200
) MARCH 22, 2001
Defendant.) YORK, SOUTH CAROLINA

VOLUME XI

BEFORE:

HONORABLE JOHN C. HAYES, III, JUDGE; and a Jury.

APPEARANCES:

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* * *

[Defense Expert Witness Janine Arvizu –
Direct By Mr. MacDougall]

[3762] Q And as I understand your testimony, Ms. Arvizu, these are labels representing three separate blood draws? Originally they were attached to three separate tubes of blood?

A That's correct.

Q Okay.

A The problem I have with sample integrity in this case is that this particular form is the last [3763] time that we ever see sample 5.4.2. That blood sample, after this date received of February 12th, 1990, doesn't ever appear again in any of the laboratory records as having been subject to analysis. It just seems to have disappeared off the face of the earth. Yet it's such an important sample, because the quality of sample 4.4.1 was degraded and they very much needed a known reference blood sample to compare to the unknowns in this case, but 5.4.2 just seems to have disappeared.

Q Okay. Thank you. You can have a seat.

* * *

[3765] Q I just got one other area I would like to explore with you, Ms. Arvizu.

Could you tell me from a laboratory assurance and laboratory quality standpoint what contamination means? We have heard a lot about contamination in the last week or so. What does it mean from a laboratory quality perspective?

A Well, contamination can come from a couple of sources. Contamination can be inadvertent. If the people collecting samples were processing samples [3766] are not well trained in the principles of contamination control, then blood can actually cross-contaminate pieces of evidence, just by physically touching.

In this case it's evident that at the time these samples were originally collected, the person who collected them did not have effective training in contamination control, because they jumbled different items of evidence together in a single paper bag, which would lead to cross-contamination of the evidence.

In addition to the fact that contamination can happen essentially accidentally during the course of handling evidence samples, it can also happen intentionally by tampering with evidence, by actual introduction of blood to, the evidentiary material. Actually putting, for example, a referenced blood sample on materials of evidence.

* * *

[Janine Arvizu – Cross By Mr. Pope]

[3770] Q So based on your evaluation, Ms. Arvizu, of the records in this case relating to quality assurance and laboratory controls, do you have an opinion with respect to the integrity of the blood evidence as we heard?

A Yes, I do.

Q What is that opinion?

A I would be concerned about the fact that the reference materials in this case were not controlled in accordance with appropriate practices, comprising their analytical quality, as seen by the fact that the sample was

degraded, and the fact that one of the reference samples was just completely lost or misdirected. What happened to that blood, from a laboratory quality assurance perspective, I would have expected the laboratory to have tested those samples to ensure that they didn't come from the referenced blood.

* * *

[3783] Q Aspirin – a bottle of aspirin has an expiration date?

A Yes.

Q I could still take the aspirin six months after the expiration date and perhaps it would work on my headache, is that correct?

A Perhaps it will.

Q Okay. And if my headache went away, then arguably it did. And if it didn't, then maybe it didn't work, is that correct?

A Yeah. And in this case we saw that the blood degraded, which was clearly an indication that the tube had expired and had compromised it for its intended use.

The problem is that with an expiration date, aspirin, the intended use is to give you a therapeutic dose of aspirin at that time.

Q Right.

A If you take it a year later, you won't get the same therapeutic dose that you would have if you had taken it within its shelf life.

Q Which as far as maintaining that blood, when you talk about degradation, that's what you are saying?

A That's what I'm talking about.

* * *

[Defense Expert Witness Dr. Peter D'Eustachio – Direct By Mr. MacDougall]

[3804] Q Doctor, I'm going to describe a hypothetical situation to you and I would like you to respond to it as a hypothetical, if you would, please.

The police come upon a crime scene. A victim has been badly beaten and has bled profusely. There are numerous – several articles of clothing that appear to have been stained with the victim's blood. There are articles in the bathroom that the victim has used following the attack that also appear to have blood and perhaps other bodily fluids on them.

Police officers enter the scene in numbers of four or five, total, collect up the evidence without gloves or gowns and without, you know, intermediate hand washing in between collection. Use paper bags from the victim's kitchen to store as many as three different articles in a single bag. That evidence is then collected at a police station, at a law enforcement facility, along with other articles of clothing taken from the suspect in the case.

Ultimately the entire collection of evidence, both the articles taken from the victim's home that are in the paper bags from the kitchen and the articles taken from the accused, which are also kept [3805] in similar bags are cataloged by the same officer in the same room, who, because there are multiple items, must go through each one to assure himself that that's what's in the bag, and, in

fact, does it in the following series: First, the victim's clothes and the articles taken from the victim that have the apparent bloodstains on them; then the bags containing the evidence taken from the accused.

Taking those facts as a hypothetical, doctor, what is your professional opinion with respect to how potential DNA testing subsequent to that series of events would be treated?

A It would – it would make it very difficult, if not impossible, to do reliable DNA testing afterwards, because there have just been in that scenario numerous opportunities for moving body fluids from one item to another, and moving them in quantities sufficient, given the sensitivity of the tests to make an item that either truly had nothing on it, or that had something on it, now appear to have something or something additional on it. And, of course, once blood, in particular, and saliva, those sorts of body fluids are mingled together on an item, whether that mingling happened as part of committing the crime or that mingling happened [3806] afterwards as part of handling the evidence, there is no way of getting those fluids apart again. There is no test that could tell you, well, fluid No. 1 got put down first and fluid No. 2 got put down at a later time. The technology just isn't there to do that. And so that kind of handling, that's what all of those anti – what all those sample handling precautions were intended to prevent that sort of transfer, potential transfer, of materials from one item to another that now makes it impossible to sort out which parts of a DNA typing pattern at the end of the day were there in the evidence at the time it was generated, which parts got there some other way.

Q From a layman's perspective, Dr. D'Eustachio, what effect would that process have on the ultimate DNA testing applied to articles of clothing in those bags?

A It makes the ultimate DNA test unreliable.

* * *

[3818] A Okay. This is one of those tracings, and in the same way that – and each of these spikes represents one element of a DNA typing pattern. They are separated along the tracing. That's basically what the fancy machinery does. The size of the spike happens to tell us how much DNA is in contributed to that particular spike. And the position tells us what kind of a spike it is. Is it a – is it – first, does it belong to the Smith family of spikes, or to the Jones family of spikes? And within the Smith family of spikes, what kind is it? Is it a type 13, or 14, or 15. And it's exactly that information which is actually generated – parts of which are generated automatically by a computer that's attached to the machine that does all of this and then checked by the analyst. It's that information that gets decoded to make up the final DNA typing pattern.

Q And this is limited solely to PCR STR? This is the kind of result that you get in that form of DNA testing?

A That's correct.

Q And when a scientist is or an analyst is [3819] actually testing DNA in his or her laboratory, is this what they get as a result?

A Yes.

Q And what evaluation does the scientist subsequently do after getting this type of graph?

A Well, we need to look at each of these spikes to ask basically does it make sense. Are these the kinds of patterns of spikes that you would expect for human DNA. It also turns out that both the shape of the spike and how much DNA is in it are also relevant to making that determination. And that's what – that is, in fact, the steps that the analyst at the FBI do. It's described in their protocol and it's also a step that I did as I reviewed the actual evidence in this case.

Q Doctor, recognizing what we have on the screen is solely for illustrative purposes and not from this case, did you have the opportunity to review the actual typing result graphs generated by the FBI laboratory in testing evidence in this case?

A Yes, I did.

Q In that examination, did you detect any issues that you believed bear upon the DNA results produced by the FBI laboratory?

A Yes, I did.

[3820] Q What were those?

A They were two. The first one actually applied to what I was calling before the shape of the peaks. A proper peak actually looks like a spike. That's a good description of it. I discovered in the actual evidence that there were also some peaks that looked like very low-lying mounds. These peaks, the analyst had suggested by actually writing on the original tracings were so called dye blobs.

What is a dye blob? What actually makes the – what actually makes the peaks visible to the machine is that as the PCR process is carried out, the xeroxing process that

makes many, many, many copies of the DNA molecule, those copies each get a colored chemical attached to them. And what the machinery actually detects is the color. Sometimes the colored chemical apparently comes loose from the xeroxed copy DNA and starts drifting through the tracing on its own.

According to the experts who first developed and validated this system, those drifting bits of dye, they named them dye blobs. And what they observed in studying this particular technical imperfection, this artifact, was that each time the dye blob appeared, it migrated differently. It [3821] migrated in an extremely unpredictable way, unlike all the authentic spikes. So if a particular sample of xerox copy DNA had dye blobs in it, and you tested that sample on several different days, all the spikes would appear in exactly the same positions over and over and over again. The dye blobs would wander all over the place.

Q What did you find in typing result graphs here?

A There were – there were items identified as dye blobs, and – but contrary to the ones described by the developers to the system, these dye blobs were perfectly reproducible. When a sample was rerun, they appeared in the identical position. More than one sample, in fact, was affected by dye blobs. And as he went – as I went from sample to sample, I saw the items that were labeled as dye blobs again appearing in the identical position.

So from that I conclude that these are not – that this is some other kind of technical imperfection and not the known imperfection, which we know how to deal with and interpret away from the rest of the evidence. This is some

other kind of imperfection that we don't necessarily know how to account for.

Q And again, in layman's terms, doctor, what does [3822] that mean with respect – as we look at the graph here, what does that mean with respect to the test results in this case and specifically the graphs that you looked at?

A Right. In order to interpret a graph, in order to draw a scientifically reliable conclusion from a graph like this, we need to be able to account for each and every feature in that graph. We're not allowed to say well, here is some features that I recognize and I like, so I'll interpret them; here are some other features that I don't necessarily recognize or understand or like, I'm not free to ignore those. I need to be able to have a scientifically satisfactory explanation for each and every feature of the graph before I can say this is a reliable graph, I know what it means as a matter of science.

Q What does all this have – what effect does this have on your scientific evaluation of the DNA results in this case, specifically the STR PCR?

A Yeah – I'm sorry, I started before you finished.

Q Finish, please.

A It makes me – as I just said, that makes the results unreliable, because I can't interpret all [3823] features of them.

Q Okay. Thank you.

* * *

BY MR. MACDOUGALL:

Q Dr. D'Eustachio, two of the items of evidence that were subject to DNA analysis in this case, and both of which are in evidence, are State's Exhibit 13 and 20. And we have seen photographs of them. I won't take the time to take them out, but I'll represent to you that this bag, paper bag, contains State's Exhibit 20, which is the underpants alleged to have been taken from the defendant in this case. And State's Exhibit 13 is the paper towel taken from the home of Ms. Stewart.

Those two exhibits were assigned and those two pieces of evidence were assigned numbers at the FBI laboratory because they were both questioned Those were – and we have heard extensive testimony, those were labeled Q-5 and Q-6.

In the course of your review of the DNA testing in this case, did you specifically have the [3824] opportunity to evaluate the DNA, and specifically PCR STR testing, as it related to Q-5 and Q-6, the underpants and the paper towel?

A Yes, I did.

Q Did you develop any conclusions with respect to the validity of the tests as it relates to the underpants and the paper towel?

A Yes, I did.

Q What did you find?

A Well, the analyst looked at each of those specimens and concluded that the DNA on them was a mixture,

a conclusion that I agree with. The reason for that conclusion was that there were more different DNA types on each item than any one person can generate out of his or her own DNA.

The analyst also reached, as I recall, the additional conclusion that that mixture was – could have come – could have been generated by combining some amount of DNA from Bobby Lee Holmes with some amount of DNA from Mary Stewart. And, once again, I had – I don't believe that that is a reliable conclusion, because, once again, not all features of the relevant part of the relevant DNA typing pattern are accounted for.

Specifically what I found – I mean, in looking [3825] at one of the DNA markers, we could call it the Smiths, was that Mary – one of the individuals, I believe Mary Stewart, was expected to give a type 16 – a type 14 spike and a type 16 spike. The other, Bobby Lee Holmes, was, if I remember right, supposed to give a 15 spike and a 16 spike. And, indeed, in the evidence one sees some amount of 14 spike, a 15 spike and a 16 spike, but there was also very clearly, and at least on one round of testing these items, also an additional spike, an 18 spike. There wasn't very much of that DNA, but it was of an amount that is appropriate to analyze and account for when one is testing mixtures. And the importance of it is that we know from looking at their known standards that neither Bobby Lee Holmes nor Mary Stewart is capable of producing type 18 DNA. They literally just don't have it in them. And so to get type 18 DNA on that evidence, either it had some other history before being picked up, or it acquired some amount of contamination thereafter. I can't tell you as a matter of science which of these two interpretations is correct.

Q Doctor, just to cut to the chase, with regard to the underpants –

A Yes.

[3826] Q – what does that mean?

A It means that I can't say. It's not – it's not a reliable conclusion that that mixture is consistent with deriving from Bobby Lee Holmes and Mary Stewart, no more, no less.

Q Are you able to detect what else is in there, if anything?

A Type 18 DNA.

Q Whose is that?

A No one that I know about from the materials that I got in this case.

Q Okay. Just finishing up, doctor, you talked about some specific aspects of the DNA typing. Could you give me your opinion as a scientist and as an expert in DNA how you would evaluate the DNA testing that was done of the evidence overall in this case?

A At the end of the day, it's unreliable tests. The – it wasn't – it wasn't handled in the way that we now know is necessary to prevent contamination from one item to the next or from outside sources. Known samples, which should give us high quality views of those peoples DNA were clearly degraded. Known samples were handled too close together in time and place with some unknown [3827] samples. And finally, there are some features of the – where the tracings need to be completely interpreted and accounted for in order to be scientifically reliable. There

are some features of those tracings that did not get interpreted, and it adds up to a test that is not reliable.

* * *

[Dr. Peter D'Eustachio – Cross By Mr. Pope]

[3844] A That's the standard that's used. If we got a clean difference, then we are looking at DNA from two different people.

Q There was no indication of that in anything that you reviewed, was there?

A There is that type 18 DNA that I can't account for.

Q And where did that come from?

A That was in both the Q-5 and the Q-6 specimens. There was a hint of some type 18 DNA running around. Type 18 for –

Q Do you know what locus it was? Allele, I guess?

A D13S – there's –

Q I'm listening, sir.

A I just ran out of words.

Q I will –

A It's at D13S and then there is a whole string of numbers, which I do not remember.

Q Okay. Let's see if I can dig that up for you, [3845] sir. It's not D3S1358?

A Could I look at that one sheet, if possible?

Q Yes, sir, be glad for you to.

A That's the piece of the report there.

Q Be sure I give you the right page.

A Right, that would be D3S1358.

Q D3S3158 you said that you found some 18?

A That – that showed up on the original tracing, yes, and on the – and in the lab report there was actually – there were both the tracings and then there was a print-out, a summary for each round of analyses that was done. And it showed – and it was logged on those summaries as well. That's – that's not – that's a summary inside the lab report, not the final report that the SLED lab got back to the FBI.

Q And this was the agent – I'm going to mispronounce his name, Baechtel's report, is that correct?

A That's correct, we are talking here entirely about Agent Baechtel's report on the PCR STR.

Q So after evaluating all these different sheets and forms that you had indicated, this is the report that he gave, is that correct?

A That's right.

[3846] Q Okay.

A That's right.

Q Based on his experience and forensic ability and testing, he determined that this was, in fact, a match, and you disagree with that, is that correct?

A That's correct.

Q Okay.

A Yeah, exactly. I am – I am looking at the same things that he did, and he says – he doesn't – he, at the end of the day, says I don't need to think about that type 18, because he doesn't record it in his report.

At the end of the day I say from, my scientific experience, hold on, I don't think we know enough to be able to stop thinking about the type 18.

* * *

[Defense Expert Witness John Kilbourn –
Direct By Mr. Nettles]

[3882] A From the moment a scene is discovered and the investigation is complete, to the very end of the case when the forensic fiber analyst packages up the evidence for the last time, every effort should be made to prevent any type of contamination. From losing evidence to the introduction of contaminants, such as fibers or hairs from you as an individual, or from coming in contact with the suspect, every precaution should be made so that that does not occur. We are dealing with such minute quantities of evidence, that these can easily be transferred and never be seen. So every effort must be taken, safeguards, so that that doesn't occur.

Q So, in other words, is it possible, giving you a hypothetical, if I handle some fiber and then I later handle some other fiber, is it possible, is [3883] what this is addressing, for me to transfer – for me to be a conduit from fiber from one item to another?

A Yes, sir.

Q I'm going to ask you about the following statement. "Protective clothing should be worn by crime scene personnel, by scientific staff, and by medical doctors

taking part in any aspect of searching." Do you agree with that?

A Yes, I do.

Q Why is that?

A Once again, we don't want to introduce or take away from that individual or from that scene any type of physical evidence. So by putting on a paper gown, putting on a white cotton lab coat, I preconvenient fibers from my clothing from being transferred into that scene or onto that deceased individual. If we lose some white cotton, that does not have really any significant forensic evidentiary value. But the nylon fibers that I might have on my shirt indeed would cause contamination and could cause some problems.

Q Let me ask you this. In relation to the last two issues that you and I just discussed, "a rather special form of contamination, which has perhaps not [3884] been given sufficient weight, is the potential sharing of fibers from a common source when individuals share a common or close environment." Does that, in effect – do you agree with that statement?

A Yes, I do.

Q Does it serve to encapsulate the last two issues that you just discussed?

A Yes, it does.

Q Now, let's talk for a second about testing. Would you agree with this statement. "Different rooms should be used to search items from different sources, scenes or

people. And these rooms should be physically located some distance from each other."

A Whenever possible, yes, sir.

Q And why should they – why should there be two separate rooms, whenever possible?

A Once again, to try to do everything that's humanly possible within reason to prevent contamination.

If we go into a room with the suspect's clothing and we make an examination in this room, then we package up the suspect's clothing and get out the victim's clothing in the same room, there [3885] may have been some trace evidence, such as fibers, that may have been lost or dislodged from the suspect's clothing and may be transferred onto the victim's clothing during our examination. And, you know, without realizing that, we then find similar fibers on both the victim's and the suspect's clothing. And one would come to the conclusion that it's possible that these two individuals had come into contact with each other. By doing this in separate rooms, we limit that possibility of contamination.

* * *

[3886] Q What does scraping fabric material mean?

A Scraping is basically where we either hold up a garment or in some cases have like a steel rod or a PVC rod and we use clothespins or some other apparatus to hold the garment up in the air. And this is normally done over a fairly large table and white butcher paper is placed on top of the table. And then a large spatula, just like a real big cake spatula, is used and the clothing is scraped down using this spatula. And what we are attempting to

do is to dislodge materials that's adhering to the surface of the clothing causing those to drop down onto the paper, and then we collect that debris for later examination.

Q What's the second major method that's used for the collection of fiber?

A This is what is known as the tape lifting method. Here we take a clean piece of butcher paper and we place it on a table, and then we place the garment down on the surface of the paper. And then [3887] we take cellophane tape. Rather than being small scotch tape, we use tape that's about four inches wide. We pull off a strip maybe eight to ten inches in length, and then we will place that sticky tape down on the garment and maybe rub across the top of the tape and then lift it off. And what we are attempting to do is to collect any loose particles, fibers, hairs, pollens, whatever types of materials that would be on that clothing. It adheres to the adhesive part of the tape. We may do this. only once. We may do this several times in a given area. Then we transfer that to a clear plastic bag or a piece of acetate, like a clear page cover, something I like that, something that we can visually see through. And we do that in a stepwise manner, systematic cover, covering the whole garment, both back and front, and sometimes the inside and outside, with this sticky tape in order to collect all the debris from this particular garment.

Q Of those two methods, which is the more – which is the preferred method?

A The most preferred method in being – having the ability to collect more of the evidence and with less contamination is by the tape lifting method.

Q I show you what i the Forensic Science [3888] Handbook, Volume II, by Richard Saferstein.

A Yes.

Q Do you recognize this to be a learned treatise in the field of forensic science?

A Yes, sir.

I'm going to read a passage, a short passage, and I ask you if you agree with me.

"If forensic laboratories are to collect, identify, compare small particles of fiber, the scraping method cannot be used. The reason for this, of course, is that one cannot be certain that contamination of questioned exhibits with knowns is not occurring, since fiber and other small particles may be suspended in the air for long periods of time, only to settle out on that large piece of wrapping paper, to be later scooped up and mounted on a slide."

Do you agree with that statement?

A Yes, sir.

* * *

[3889] Q Okay. Now, we have already discussed and you told us different rooms should be used?

A Yes.

Q Would you agree that different examiners should agree – should examine the suspect and the known samples?

A I don't believe that that's an absolute necessity, but if only one examiner does make the examination, then

there should be significant precautions that are made. Primarily that if they are done in – hopefully in separate rooms. The individual that is doing the examination should examine one item of clothing on one day and then – say the victim's clothing on one day, and then wait until the next day to examine the suspect's clothing. If that's not feasible, then at least the individual doing the examination should at least put on a clean lab coat and not use the same lab coat. [3890] Once again, to do everything that's possible to prevent contamination and cross-transfer of evide ce.

Q Now, let me ask you this. Have you had the opportunity to review the report that was done by SLED Agent Barron, is that correct?

A Yes.

Q And the testing that he did?

A Yes.

Q Were there other tests that were – that, in your professional opinion, you feel should have been done that were not?

A On the examination of the fibers?

Q Yes, sir.

A Yes.

Q Well, share with us what tests you think should have been done.

Well, let me ask you this then. Is one of those tests the FTIR test?

A Yes.

Q What does that stand for?

A FTIR stands for Forrier Transform Infrared Spectroscopy, which is a big word. That is an instrumental method that forensic scientists and chemists utilize to identify, and on many occasions, [3891] compare chemical compounds. And we could take a very small amount of sample, even a small – a very small fragment of a fiber, and we can, by running FTIR analysis, determine the exact chemical makeup of that fiber.

* * *

Q Let me ask you about this. How about the Optical Property Refractive Index Measurement?

A Yes.

Q Is that a fairly common test?

A Yes.

Q Okay. Is it – tell us a little bit about that.

A What we are saying here is looking at one of the properties of these fibers that we describe as optical properties. In some respects Mr. Barron examined the optical properties, because he took the fiber. He mounted it on a microscope slide in a mounting media. He put a cover slip on it, looked at it through a polarizing light microscope. And by making these observations he was able to tell what kind of fiber. And every good fiber analyst should be able to look at a fiber and in most cases tell what the fiber is.

[3892] He looked at a fiber, a blue fiber, and he said this is – based on the optical properties that I'm observing, this is an acrylic fiber. This black fiber is a polyester. And

another black fiber is a cotton. And finally there was a gold fiber, that he identified as a modacrylic fiber. So he did indeed do – measured optical properties.

An additional method that he could have used and one that many forensic scientists, fiber examiners, use, and one that I use, is taking it a step further and measuring specific optical properties. In this case it's called the refractive index. And all crystalline materials, transparent materials, have the ability for this optical property to be measured.

Refractive index, in the most simple terms, is we note, refractive index, whenever you take a pencil or a stick and you put it in a glass of water, you notice that it looks bent or broken. And the reason is that that the light passing through the water passes through it at a lower velocity than the light passing through the air above – or at the top of the glass above the water.

So we can measure these optical properties. It's a test that is nondestrucive. It takes time to [3893] do it, but is one that I feel like is essential, because we may have two fibers that are – appear to be exactly the same microscopically. They appear to be two blue acrylic fibers, but by measuring the refractive index, we may find that indeed they are different because they have different refractive indices.

Q Okay. And the last one is this. You reviewed the tests that were done, correct?

A Yes.

Q And was sufficient testing done, in your opinion, to make the opinion that the dyes were – that the dyes were identical?

A No.

Q Okay. Why is that?

A Well, Mr. Barron did do some tests on the color. He – first of all, he examined it visually. He most probably looked at it under a comparison microscope, where he *was* looking at the known and the unknown and seeing if they were the same color.

He also did a test, an instrumental analysis, called a microspectrophotometer, a visible microspectrophotometer, which measures the color and tell you whether or not the color between these two fibers are indeed the same.

[3894] However, in order to analyze the dyes and say that the dyes are identical, the dyes have to be removed from the fiber and then some type of testing has to be done to determine whether or not indeed the same pigments are present in the known and unknown fiber.

Q Is that sort of like taking a paint chip to a paint place and having them mix it?

A Yes.

Q Now, if, in terms of the testing that you saw, the word match was used. In your professional opinion, do you find – what word do you use when you arrive at the same conclusions that Mr. Barron had?

A I normally in a case like this will say that two fibers are consistent with each other.

Q What, in your mind, is the difference between consistent and match?

A I personally don't have any problem with either term, because I understand the meaning of that. And if I was talking to another forensic scientist and we were talking about a match, both of us would understand the limitations of that.

Q What are those limitations?

A Well, basically that you cannot say that a [3895] fiber came from a particular garment.

Q Okay.

A And it's easy when you use the term match for individuals that are not familiar with these forensic terms to think, well, if I match this fiber to the fibers in this blanket –

Q Right.

A – that they may think that I mean that fiber had to come from that blanket.

Q Why can't you say that?

A Because fibers are mass produced.

Q Right.

A And in this particular case where we have a black sweat shirt having black cotton and black polyester fibers, we basically do not have any way of knowing how many hundreds or thousands of those black sweat shirts were produced by this company.

Q Right.

A Furthermore, we don't know how many other companies use these black fibers to also make black sweat

shirts. And we also don't know how many other types of garments might have been made with the same color, black polyester and cotton, that was manufactured.

* * *

[3896] BY MR. NETTLES:

Q Now, recognizing there are limitations to what you can do, because you don't have the actual fiber in this picture, but would you agree with me that at least the possibility exists for a number of different types of fiber to be found just in the confines of this picture?

A Oh, yes, most certainly.

Q Okay. And based on what? I mean, how about tell us a little bit about this carpet at the bottom here.

A Well, first of all, we have a variety of colors to start with. And, you know, if you have a red fiber and a gold fiber, they are different fibers. They came from two different sources, basically, unless it's a mixture of both gold and red fibers. But there we can see that there are a whole variety of colors of fibers. That would be our first examination.

Now, whether those fibers are acrylic, or polyester, or nylon, without actually making an examination, we really don't know what the fibers would be.

[John Kilbourn – Cross By Mr. Pope]

[3912] Q So you said basically whether you say consistent or match, in that context its different than a DNA match, but it matches within the realm of your field, is that correct?

A Well, you just have to be very careful how those terms are interpreted. If you use the term DNA match, people, I feel – at least I do, that where you are talking about unique to that individual or the statistical is such that, you know, it's one in ten thousand, or something like this. So that's the reason I stay away from that term and use consistent with, because I'm not saying that this is unique and that there is one in ten million chances that that fiber came from another sweat shirt. What I'm saying is that – the only thing that I can say is that that fiber looks like the unknown – the known and the unknown looks the same, and whatever other measurements we might make, including those that SLED made, as well as those that I additionally proposed, whatever factors that [3913] we have, that's the way we come up and say that the two are consistent.

Q And is this a fair statement – same microscopic characteristics, is that a fair statement?

A Yes.

Q So we are basically saying it three different ways, saying the same thing? You are just trying to make sure to distinguish it from something as precise as DNA?

A That's correct.

Q And, again, using the DNA example, you can't say that a fiber came from a particular garment? You can just say look, I got these fibers. They're on these things and they match, unless, of course, as in this case where the fiber was actually removed as a known from the black one. That's the only way that you could tell if it came from a particular garment, is if you pulled it off that garment, is that right?

A That's exactly correct.

* * *

[Defense Expert Witness Donald Girndt –
Direct By Mr. Morton]

[3944] Q Do you know whether currency in this case was subjected to fingerprint analysis or not?

A I don't believe I saw a fingerprint report on currency, no.

* * *

[Donald Girndt – Cross By Mr. Pope]

[3965] A I didn't see an indication it was fabricated, but I can show you that in the latent itself are some striations that I did not observe in the door then I went over to look at the actual door.

Q And back in January of 1990, what day of that month did you go look at that door?

A I did not go look at it in 1990. I looked at it in January of this year.

Q Ten years later?

A That's right.

Q Okay.

A I'm just saying that when I looked at it, I did not see striations.

* * *

[3966] Q And the fingerprinting currency, did SLED always fingerprint currency on every robbery case?

A When it was submitted. Whatever was submitted to the fingerprint laboratory was printed.

* * *

[Donald Girndt – Redirect By Mr. Morton]

[3989] Q Agent Girndt, we don't know where this palm print came from, do we?

A Not with the material that I was provided, no.

Q With the material that you were provided and with the photographs that were taken, you don't know – there is no way to tell where that left palm print came from, is that fair?

A No, I can't.

Q Let me show you what's been marked – did you have see the photograph of the fingerprint from the outside of the door?

A Yes.

Q And I know it's here somewhere. And do you [3990] remember – here it is. It's Defendant's Exhibit No. 22.

Do you see background, any background noise in there?

A Yes.

Q What is that typical of, in your experience?

A This particular surface exhibits what appears to be some water spots, kind of like rain would get on the surface of a car, surface of the door, or something like that. The fingerprint powder will actually show you where the moisture was at one time, so this appears to be some water spots.

Q Okay. And you have observed, once again, the photograph of State's Exhibit 15, which is the palm print?

A Yes.

Q And what does the background in that typically exhibit? What is that most typical of, in your experience?

A It's typical of a latent on a background that's perhaps been painted with a paintbrush.

Q And you have observed the photograph that was taken on January the 1st of 1990, or December 31st of '89, correct?

A Yes.

[3991] Q And you have also observed the door at a later date that was at Ms. Stewart's apartment, correct?

A Yes.

Q Did you see evidence of paintbrush strokes where this print was taken from? Can you say that?

A No, I did not observe any.

* * *

[Defense Witness Tina McCombs Bells –
Direct By Mr. Morton]

[4022] Q And do you know this young man right here?

A Yes.

Q Let me ask you a little bit – how do you know him?

A He's my brother.

Q He's your brother?

A Uh-huh.

Q Is his hair about the same length as it was on that morning?

A Yes.

Q Okay. And how old was he on December the 31st of '89, do you know?

A Seventeen.

Q Okay. And were you with him that day?

A Yes.

Q And had you been with him all day long that day?

A Yes.

Q And had you been with him and his friends that evening?

A Yes.

* * *

[4028] Q Okay. What happened at your house next?

A About 8:30 – 8:00 or 8:30 the officer come, Boot and George Thompson.

Q Officer Boot Smith?

[4029] A Uh-huh.

Q And that would be Sergeant Smith from the York Police Department?

A Yes, sir.

Q Came to your house at what time?

A 8:00 or 8:30 that morning.

Q And –

A Asked.

Q And who?

A And George Thompson.

Q George Thompson.

A Uh-huh.

Q Who is George Thompson?

A He hanging with Boot. He hanging with the officer.

Q He was in the car with Boot Smith at eight o'clock in the morning?

A Yes.

Q At your house?

A Yeah. When they come to the door, they was together.

Q And what were they doing?

A They just told me they wanted to ask me some questions, come downtown. So I went downtown to the police station.

[4030] Q Did they give you a choice about whether to go, or did you volunteer to go with them, or what?

A When I got down there, they told me about Bobby Holmes told me to come down there, that he had –

Q Wait a minute. Wait a minute. Hold on. They came to your house?

A Uh-huh.

Q And they asked you some questions?

A No, they just told me to come downtown to the police station.

Q And this is officer – Sergeant Smith, along with George Thompson?

A Uh-huh.

Q And they told you to come down to the police station?

A Uh-huh.

Q And when you got down to the police station, they started asking you some questions about Bobby Holmes?

MR. THOMPSON: Objection, Your Honor. He's leading.

THE COURT: Yes.

MR. MORTON: I was just – she had already said –

THE COURT: I know, I know, but I think I'm more concerned about the next questions that's going [4031] to follow that into it.

MR. MORTON: I understand.

BY MR. MORTON:

Q And what questions were they asking you about Bobby Holmes?

A They asked me about some stolen cars. Asked me did he steal any cars.

Q Okay.

A That's the question they was asking me.

Q Okay. And you talked to them about that?

A Yes.

Q And how long did you have to stay down at the police station?

A An hour.

Q And was Terrence Digsby there too?

A Yes, he was.

Q Were they asking him those same questions?

A Yeah, but we was in different rooms.

Q Okay. Well, how do you know they was asking him the same questions?

A Because one of the officers came back and told me they were asking him questions and he was telling – the officers were telling him that Terrence said yeah, Bobby stole two cars, and they wanted me to witness to it that he did it.

* * *

[4042] Q Now, when you got – you said Boot Smith came to your house at about four o'clock that morning? Oh, I'm sorry, about – what time was it?

A It was about 8:00, 8:30.

Q And he had someone named George Thompson with him?

A Yes, he did.

Q George Thompson is not a police officer, is he?

A No, he's not.

Q And when Boot came, he told you that he wanted to ask you some questions, if you come down with him, right?

A He told me to come downtown.

Q And like you said a little bit ago, he said he wanted to ask you some questions?

A Yeah, when I got to the police station I said.

[4043] Q Right. Right. And you went down with him, right?

A Yes, I did.

Q He didn't arrest you, did he?

A No, he told me that – they told me if he couldn't find Bobby Holmes, that they are liable to charge me – what you call it when they can't find a person and they see it's a person running – I forget what they said. But he said he would like charge me for that.

* * *

[Defense Witness Lucille Tolbert –
Direct By Mr. Nettles]

[4065] Q Now, how far were you from – was there a church near your trailer?

A Central Baptist.

Q Yes, ma'am. And where was that in relation to where you lived?

A Okay. My trailer sit like this.

Q Okay.

A A bunch of bushes, and bushes, and the gutter was right here.

Q Yes, ma'am.

A Central Baptist Church is here.

Q Okay. And I'm showing you what we have marked before you got here, so we can keep up with it, its called Defense Exhibit 32.

A Uh-huh.

Q Do you recognize that right there? Is that the church?

A This is the back of it, yes.

Q Yes, ma'am. So you are kind of back over here behind it?

A I'm –

Q Just point it out so they can see.

A I'm straight past that. Straight past that across the field is my trailer.

[4066] Q Okay. Well, it's not where you live any more, though, right?

A No.

Q But you lived there at the time?

A Yes.

Q And were you living there on December 31st of 1989?

A Yes.

Q Okay. In the morning of December – well, did – sometime around December 31st of 1989, did you receive a knock at your door early in the morning?

A Yes.

Q And tell me about that. Tell me – tell me about how – what time did you get up that morning?

A I got up, it was between 5:30 and 6:00 o'clock in the morning.

Q All right. And how – and if you don't mind me getting too personal, how is it that you know that you got up between 5:30 and 6:00 o'clock?

A Because I have my clock set every morning for that. I'm a diabetic.

Q Yes, ma'am.

A And my time for taking my shots is six o'clock in the morning.

[4067] Q And so you know that – so sometime between that time you woke up?

A Yes.

Q You cut on the light?

A Uh-huh.

Q And as you said, there was a knock at the door at some point?

A Not the time I got up. Shortly after I got up.

Q Okay. And what did you do when you heard that knock at your door?

A I turned around. I was in the kitchen.

Q Uh-huh.

A I turned around and I went to the door.

Q Uh-huh.

A And I unlocked the door.

Q Uh-huh –

A It was a young man standing there.

Q Okay.

A And that's – I looked at him and he said "ma'am, could I have glass of water, please?"

Q Yes, ma'am.

A And I said –

Q So what did you do when he asked you that?

A I said sure, and I turned around, went up my hall and went to the refrigerator.

* * *

STATE OF SOUTH CAROLINA)
) IN THE COURT OF
COUNTY OF YORK) GENERAL SESSIONS

THE STATE) TRANSCRIPT OF RECORD
) 90-GS-46-1196
-vs-) 90-GS-46-1197
) 90-GS-46-1198
BOBBY LEE HOLMES,) 90-GS-46-1200
) MARCH 23, 2001
Defendant.) YORK, SOUTH CAROLINA

VOLUME XII

BEFORE:

HONORABLE JOHN C. HAYES, III, JUDGE; and a Jury.

APPEARANCES:

THOMAS E. POPE, SOLICITOR
WALTER WILLIAM THOMPSON,
ASSISTANT SOLICITOR
KEVIN BRACKETT, ASSISTANT SOLICITOR
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JONATHAN M. KRELL, ESQUIRE
JEFFREY BLOOM, ESQUIRE
HEATHER J. PELLEGRINO, ESQUIRE
Attorneys for the Defendant.

* * *

[Prosecution's Closing Statement]

[4195] So let's go now to what is the basis of the State's case and the basis of the defense attack to the State's case: Somebody leaves something at the scene or takes something away. It could be property that you took away. It could be fiber evidence, blood, DNA, latent prints. It could be taken away. It can be left. And I submit in this case you have all of that. You have an abundance of that.

Stolen property. What do we have? We have his wallet. It was recovered. And do you remember the victim said $40.00. $40.00 was taken. She told some of her friends, and we had her friends come and talk about cashing her check, and $40.00 was taken. And I want you to notice there is $44.00. So you don't have the exact amount, but you have got the defendant, when he's arrested that morning, [4196] presumably having been in bed since he got home from the crime, in his wallet he has $44.00.

* * *

[4215] So if Mr. Holmes didn't commit the crime, that's one explanation. Mr. Holmes did it. You got his palm print. You got his DNA. You know, their DNA guy said well, I have got some concerns because, you know, had that 18, but he also said Dr. Baechtel, who does this every day, his job to read and analyze that, and he read that as a match. So you put the weight on it that you want to put.

* * *

[4220] So the bottom line comes down to the defendant was framed. That's the only possible answer. Let's see what that would entail.

Ladies and gentlemen, if we are going to frame somebody, we have got a horrible, horrible crime. And you are

going to frame somebody, why Bobby Holmes? Because if you get Bobby Holmes and you frame this guy – and you have to admit as much evidence as there is, a lot of work goes into framing somebody. And if you are going to frame them and it's going to be Bobby Holmes, where is this raping, murdering, beating fellow that actually did this thing? If they're out there to protect the community, what goal of putting Bobby Holmes in jail and leaving this guy running the street to do it again?

* * *

[Verdict Of The Jury (Guilt Phase)]

[4350] THE COURT: Mr. Foreman, I understand the jury have reached a verdict?

JURY FOREMAN: Yes, sir.

THE COURT: If you will hand them up by way of the bailiff.

THE CLERK: Indictment 90-GS-46-1200 for robbery, "we, the jury, unanimously find the defendant Bobby Lee Holmes guilty of robbery."

Signed by foreperson, March 23rd, 2001.

Indictment 90-GS-46-1197, "we, the jury, unanimously find the defendant Bobby Lee Holmes guilty of burglary."

Signed by the foreperson, March 23rd, 2001.

Indictment 90-GS-46-1196, "we, the jury, unanimously find the defendant Bobby Lee Holmes guilty of criminal sexual conduct in the first degree."

Signed by the foreman, March 23rd, 2001.

Indictment 90-GS-46-1198, "we, the jury, unanimously find the defendant Bobby Lee Holmes guilty of murder."

* * *

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF
	)	GENERAL SESSIONS
COUNTY OF YORK	)	
THE STATE	)	TRANSCRIPT OF RECORD
	)	90-GS-46-1196
-vs-	)	90-GS-46-1197
	)	90-GS-46-1198
BOBBY LEE HOLMES,	)	90-GS-46-1200
	)	MARCH 25, 2001
Defendant.	)	YORK, SOUTH CAROLINA

VOLUME XIII

BEFORE:

HONORABLE JOHN C. HAYES, III, JUDGE; and a Jury.

APPEARANCES:

THOMAS E. POPE, SOLICITOR
WALTER WILLIAM THOMPSON,
ASSISTANT SOLICITOR
KEVIN BRACKETT, ASSISTANT SOLICITOR
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WILLIAM N. NETTLES, ESQUIRE
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JEFFREY BLOOM, ESQUIRE
HEATHER J. PELLEGRINO, ESQUIRE
Attorneys for the Defendant.

* * *

[In Camera Hearing On Use Of Third-Party Guilt Evidence During Sentencing Phase]

[4404] THE COURT: All right. Is the State ready to proceed?

MR. BRACKETT: The State is ready, Your Honor.

THE COURT: Does the State have any matters we need to take up before we move forward?

MR. BRACKETT: I believe the third-party –

THE COURT: I asked did the State have any.

MR. BRACKETT: No. I'm sorry, I might misheard.

THE COURT: Does the defendant have anything.

MR. NETTLES: Well, Your Honor, yes, we ask the court to revisit the issue of third-party guilt.

The admissibility of that in the penalty phase, I feel like it's been argued, it's been briefed. If the court has any questions, I'll be happy to field them, but, otherwise, I would rest on the previous argument that we made in Spartanburg and I would rest on the brief that was filed.

THE COURT: I have got it right here. I'm going to deny the motion. I have read and have here with me, but I have read and reread, and I'm not going to give the citations. I think all of you have them. And I think most of you are familiar with these, Lockett v. Ohio, Chambers

* * *

STATE OF SOUTH CARCLINA	)	
	)	IN THE COURT OF
	)	GENERAL SESSIONS
COUNTY OF YORK	)	
THE STATE	)	TRANSCRIPT OF RECORD
	)	90-GS-46-1196
-vs-	)	90-GS-46-1197
	)	90-GS-46-1198
BOBBY LEE HOLMES,	)	90-GS-46-1200
	)	MARCH 28, 2001
Defendant.	)	YORK, SOUTH CAROLINA

VOLUME XVI

BEFORE:

HONORABLE JOHN C. HAYES, III, JUDGE; and a Jury.

APPEARANCES:

THOMAS E. POPE, SOLICITOR
WALTER WILLIAM THOMPSON,
ASSISTANT SOLICITOR
KEVIN BRACKETT, ASSISTANT SOLICITOR
E.B. SPRINGS, IV, ASSISTANT SOLICITOR
BETTY MILLER, ASSISTANT SOLICITOR
Attorneys for the State.

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JEFFREY BLOOM, ESQUIRE
HEATHER J. PELLEGRINO, ESQUIRE
Attorneys for the Defendant.

* * *

[Verdict Of The Jury (Sentencing Phase)]

[5737] THE COURT: Mr. Foreman, I understand the jury has reached a verdict.

JURY FOREMAN: Yes, sir, we have.

THE COURT: If you will hand it up by way of the bailiff.

All right. This is the State of South Carolina versus Bobby Lee Holmes, in the Court of General Sessions, 90-GS-46-1198.

Jury's verdict on proof of aggravating circumstances. We, the jury, in the above-entitled case unanimously find beyond a reasonable doubt the existence of the following statutory aggravating circumstances:

1. The murder was committed while in the [5738] commission of criminal sexual conduct.

2. The murder was committed while in the commission of burglary.

3. The murder was committed while in the commission of physical torture.

Its signed by all twelve jurors.

Jury's determination for sentence to be imposed: We, the jury, in the above-entitled case unanimously recommend that the defendant, Bobby Lee Holmes, be sentenced to death.

It is signed by all twelve jurors.

* * *

[5749] THE COURT: Mr. Holmes, the sentence on the charge of robbery –

THE DEFENDANT: Man, I don't want hear. I don't want to hear that, man.

THE COURT: – is fifteen years concurrent.

THE DEFENDANT: I don't want to hear that.

THE COURT: Criminal sexual conduct –

THE DEFENDANT: I don't want to hear it, man. [5750] I don't want to hear you. I don't want to hear you. I don't want to hear you.

THE COURT: – first degree – thirty years concurrent on criminal sexual conduct in the first degree.

Life for burglary, concurrent.

The death penalty for murder.

* * *

[Defense Exhibit #56]

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

CARROLL A. CAMPBELL, JR.
Governor

ROBERT M. STEWART
Chief

[SEAL]

4400 Broad River Road (J.P. Strom Boulevard)
• Mail: P.O. Box 21398 Columbia, South Carolina
29221-1398 • Phone: 803/737-9000

March 9, 1990

TO: William C. Mobley
York Police Dept.
P. O. Box 500
York, SC 29745

LABORATORY FILE NO: L90-0010
SEROLOGY REPORT

SUBJECT(S): Bobby Lee Holmes

VICTIM(S): Mary Stewart

This is an official report of the South Carolina Law Enforcement Division Criminalistics Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case has been or will be conducted by any other Laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEM(S) SUBMITTED

1. Brown bag #1 containing:
   - 1.1 One (1) blue and black robe
   - 1.2 One (1) pink night gown
   - 1.3 One (1) pair flowered bedroom shoes
2. Brown bag #2 containing bedding from victim's bed:
   - 2.1 White sheets
   - 2.2 Flowered sheet
   - 2.3 Two green pillow cases
   - 2.4 One (1) flowered pillow case
3. Brown bag #3 containing:
   - 3.1 Pink robe
   - 3.2 Pink night gown (Mary Stewart)
   - 3.3 White rag
4. One (1) Sexual Assault Kit (Mary Stewart) taken from Devine Saviour Hospital
   - 4.4.1 Blood
5. One (1) Sexual Assault Kit (Mary Stewart) taken from Charlotte Memorial Hospital
   - 5.4.1 Blood
   - 5.5 Saliva
   - 5.6 Smears (rectal)
   - 5.7 Vaginal swab
   - 5.8 Rectal swab
6. One (1) Sexual Assault Kit (Bobby Lee Holmes) taken from Devine Saviour Hospital
   - 6.3.1 Blood
7. One (1) white rage (bag #7)
8. Brown envelope #8 containing one (1) blue tank top from subject.
9. Brown envelope #9 containing one white paper towel

10. Brown bag #10 containing one (1) black Gamecocks baseball cap (Bobby Lee Holmes)
11. Brown bag #11 containing one (1) pair Nike tennis shoes (black) from Bobby Lee Holmes.
12. Brown bag #12 containing one (1) pair Bugle Boy blue jeans from Bobby Lee Holmes.
13. Brown bag #13 containing one (1) pair mens white shorts from Bobby Lee Holmes.
14. Brown bag #14 containing one (1) black sweat jacket (Bobby Lee Holmes.
15. Brown bag #15 containing a white plastic bag containing
    - 15.1 One (1) blue and white striped shirt
    - 15.2 One (1) black sweat shirt
    - 15.3 One (1) pair socks (Bobby Lee Holmes)
19. Paper towels

RESULTS OF EXAMINATION(S)

1.1 No semen identified.
1.2 No semen identified, human blood identified.
1.3 Nothing of serological evidentiary value found.
2.1 No semen identified, human blood identified.
2.2 No semen identified, human blood identified.
2.3 No semen identified.
2.4 No semen identified.
3.1 No semen identified.
3.2 Human blood identified. No semen identified.
3.3 No semen or blood identified.
4.4.1 ABO Group "O" PGM subtype 1+.
5.4.1 No analysis conducted.
5.5 No analysis conducted.
5.6 No spermatozoa identified.
5.7 No semen identified.
5.8 No semen identified.
6.3.1 ABO Group "B" PGM subtype 1-1+.

7. No semen or blood identified.
8. No blood identified.
9. Human blood identified PGM subtype 1+ activity detected.
10. Nothing of serological evidentiary value found.
11. Nothing of serological evidentiary value found.
12. Human blood identified, attempts to further characterize the sample were in conclusive. No PGM subtype activity detected.
13. No semen identified. Human blood identified, attempts to further characterize the sample were inconclusive. No PGM subtype activity detected.
14. No blood identified.

15.1 No semen identified. Human blood identified, attempts to further characterize the sample were inconclusive. No PGM subtype activity detected.

15.2 No blood identified.

15.3 Nothing of serological evidentiary value found.

[Defense Exhibit #57]

SOUTH CAROLINA LAW ENFORCEMENT DIVISION FORENSIC SERVICES LABORATORY REPORT

CARROLL A. CAMPBELL, JR.
GOVERNOR

ROBERT M. STEWART
CHIEF

[SEAL]

Serology Department
Additional Report
April 13, 1993
SLED Lab No: L90-0010
Your Case No: Not Listed
Incident Date: 12-31-89
(S) Bobby Lee Holmes
(V) Mary Stewart

Capt. William C. Mobley
York Police Dept.
PO Box 500
York, SC 29745

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case has been or will be conducted by any other Laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEMS SUBMITTED

1. Brown bag #1 containing:

1.1 One (1) blue and black robe

1.2 One (1) pink nightgown

1.3 One (1) pair flowered bedroom shoes

2. Brown bag #2 containing bedding from victim's bed

2.1 White sheets

.2 Flowered sheet

RESULTS OF EXAMINATIONS

1.1 No semen identified.

1.2 No semen identified. Human blood identified. ABO Group "O"

1.3 Nothing of serological evidentiary value found.

2.1 No semen identified. Human blood identified.

2.2 No semen identified. Human blood identified.

ITEMS SUBMITTED

2.3 Two (2) green pillowcases

2.4 One (1) flowered pillowcase

3. Brown bag #3 containing:

3.1 Pink robe

3.2 Pink nightgown (Mary Stewart)

3 White rag

4. One (1) Sexual Assault Kit (Mary Stewart) taken from Devine Saviour Hospital

4.4.1 Blood

5. One (1) Sexual Assault Kit (Mary Stewart) taken from Charlotte Memorial Hospital

5.4.1 Blood

5.5 Saliva

5.6 Smears (rectal)

5.7 Vaginal swab

5.8 Rectal swab

RESULTS OF EXAMINATIONS

2.3 No semen identified.

2.4 No semen identified.

3.1 No semen identified.

3.2 No semen identified. Human blood identified. ABO Group "O" PGM subtype 1+ activity detected.

3.3 No semen or blood identified.

4.4.1 ABO Group "O" PGM subtype 1+

5.4.1 No analysis conducted.

5.5 No analysis conducted.

5.6 No spermatozoa identified.

5.7 No semen identified.

5.8 No semen identified.

ITEMS SUBMITTED

6. One (1) Sexual Assault Kit (Bobby Lee Holmes) taken from Devine Saviour Hospital

6.3.1 Blood

7. One (1) white rag (bag #7)

8. Brown envelope #8 containing one (1) blue tank top from subject.

9. Brown envelope #9 containing one (1) white paper towel

10. Brown bag #10 containing one (1) black Gamecocks baseball cap (Bobby Lee Holmes)

11. Brown bag #11 containing one (1) pair Nike tennis shoes (black) from Bobby Lee Holmes

12. Brown bag #12 containing one (1) pair Bugle Boy blue jeans from Bobby Lee Holmes

13. Brown bag #13 containing one (1) pair mens white shorts from Bobby Lee Holmes

4. Brown Bag #14 containing one (1) black sweat jacket (Bobby Lee Holmes)

RESULTS OF EXAMINATION

6.3.1 ABO Group "B" PGM subtype 1-1+

7. No semen or blood identified.

8. No blood identified.

9. Human blood identified ABO Group "O" PGM subtype 1+ activity detected.

10. Nothing of serological evidentiary value found.

11. Nothing of serological evidentiary value found.

12. Human blood identified; attempts to further characterize the sample were inclusive. No PGM subtype activity detected.

13. No semen identified. Human blood identified; attempts to further characterize the sample were inconclusive. No PGM subtype activity detected.

14. No blood identified.

ITEMS SUBMITTED

15. Brown bag #15 containing a white plastic bag containing items from Bobby Lee Holmes:

15.1 One (1) blue and white striped shirt.

15.2 One (1) black sweat shirt

15.3 One (1) pair socks

9. Paper towels

RESULTS OF EXAMINATIONS

15.1 No semen identified. Human blood identified; attempts to further characterize the sample were inconclusive. No PGM subtype activity detected.

15.2 No blood identified.

15.3 Nothing of serological evidentiary value found.

19. No semen identified. Human blood identified; attempts to further characterize the sample were inconclusive. No PGM subtype activity detected.

Samples from items 4.4.1, 5.4.2, 6.3.1, 9.1, 12.1, 13, 15.1, and 19.2 were sent to South Carolina Law Enforcement Division's DNA Department on February 12, 1990 for further analysis.

These examinations were conducted by S/A Nancy M. Greene, Forensic Serologist with this Division.

/s/ Nancy M. Greene
Nancy M. Greene
Special Agent

April 3, 1995
Date

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,
Respondent,

v.

Bobby Lee Holmes,
Appellant.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 25886
Heard February 19, 2004 – Filed November 1, 2004

AFFIRMED

Senior Assistant Appellate Defender Wanda Haile, of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Thomas E. Pope, of York, for respondent.

JUSTICE MOORE:

Appellant was convicted[1] of murder, first degree burglary, first degree criminal sexual conduct (CSC), and robbery. He received a death sentence for the murder, the jury having found three statutory aggravating circumstances,[2] and received three concurrent sentences for the other offenses.[3] Appellant alleges errors occurred in both the guilt phase and the sentencing phase of his trial. We affirm appellant's convictions and sentences.

FACTS

At approximately 6:15 a.m. on December 31, 1989, the eighty-six-year-old victim opened her door in response to someone's knocking. A black male forced his way into her apartment, beat her about the chest and head, and demanded money. The man forced the victim into her bedroom where he ripped off her nightgown and anally raped her. He took $40 from her purse and left the apartment after ripping the living room phone from the wall.

At 7:45 a.m., the victim's friend (Mrs. Thrasher) phoned to check on the victim. After six or seven rings, the victim answered and told Mrs. Thrasher she had been beaten, anally raped, and robbed. Mrs. Thrasher called

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[1] This was appellant's second capital trial. His direct appeal from the first trial was affirmed, *State v. Holmes*, 320 S.C. 259, 464 S.E.2d 334 (1995), *cert. denied*, 517 U.S. 1248 (1996); appellant was subsequently granted a new trial on post-conviction relief.

[2] The aggravating circumstances were murder during the commission of burglary, murder during the commission of CSC, and physical torture.

[3] The imprisonment terms were life for burglary; thirty years for CSC; and fifteen years for robbery.

another friend, Mrs. Byers, who had an automobile and a key to the victim's apartment. Mrs. Byers went to the apartment, noticed it was messy, spoke with the victim who told her the assailant was "big and dark," and then drove to the police department since the living room phone had been pulled off the wall.[4]

The first officer on the scene was Dale Edwards. The victim told him that around 6 or 6:30 a.m. she heard knocking at her front door and that when she opened the door, a black male forced his way in. She had taken a shower before the police arrived. Officer Edwards removed the sheets and pillowcase from the bed for use as evidence; and placed the items in a paper grocery bag taken from the victim's kitchen. Lt. Barnett arrived and assisted in the evidence collection. A pink nightgown, a housecoat, and a rag were removed from the bathroom and placed in another grocery bag. The victim gave Officer Edwards a pink paper towel with blood on it that he placed in a manila envelope brought to the scene by Captain Mobley, the third officer on the scene.

While the three police officers were there, two paramedics arrived to transport the victim to a local hospital emergency room. Blood samples were taken, but a rape kit was not processed because the victim was complaining of hip pain and medical personnel were awaiting X-rays before performing the exam. The blood testing kit used to take samples from the victim had "expired" several months earlier.[5] Before the victim's mental state began to

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[4] The victim apparently answered Mrs. Thrasher's call using her bedroom phone.

[5] Appellant includes the use of an expired kit in his argument that the forensic evidence was compromised. There was evidence, however,

(Continued on following page)

deteriorate, she described her attacker to an emergency room nurse as a black male in his late twenties. On February 19, 1990, the victim was transferred to a nursing home where she died in March. The cause of death was pneumonia, which developed as the consequence of her severe brain injury.

Captain Mobley testified he arrived at the victim's apartment as the EMS personnel were transporting her out the door. He took custody of the evidentiary items from Officer Edwards and Lt. Barnett. He sent Officer Edwards door to door in the neighborhood and instructed Lt. Barnett to go to the hospital and speak with the victim.

Lt. Barnett recorded the victim's statement at the hospital emergency room before she became confused. She described her attacker's clothing: "a dark jacket, must have been blue or black, must have been black;" "a pair of those funny looking pants . . . not the old pant, but something that's kind of mixed up you know;" his hair: "kind of long. Not too long, but a little longer than you usually wear it;" she then said: "he was middle aged. He was young. He was not too young. And he, as I remember, his hair was not short or not too long." The victim described her attacker as dark skinned, "not too heavy. Not too slim."

Later that day, Officer Edwards talked to several of the victim's neighbors. Ms. Boyd told him she heard knocking at her door about 3 a.m.; Mr. Lynn, who lived next door to the victim, reported knocking between 5:30 a.m. and 6:30 a.m.; and Ms. Diggs, who lived on the other

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that the expiration date is a manufacturer's "guess" as to how long the vacuum in the blood collection vials will remain good, and that the kit can be used after that date if the vacuum remains effective.

side of the victim, heard someone knocking on her door around 6 or 6:30 a.m.

Officer Grady Harper testified he was dispatched to an apartment complex near the victim's residence at about 4:43 a.m. on December 31, 1989. A number of people, including appellant, were making a disturbance, and Officer Harper told them to quiet down and move on. Appellant was unruly, and Officer Harper called for back-up to assist in arresting appellant. When the additional officers arrived, appellant ran. Officer Harper saw appellant get into a car; Officer Harper gave chase in his patrol car. The driver stopped the car and appellant ran from it. The last time Officer Harper saw appellant was about 5:30 a.m. and the other officers were chasing appellant. One of the "chasing" officers testified he lost sight of appellant at about 5:20 a.m. Appellant was wearing a black sweater with a hood and blue jeans.

Captain Mobley testified that after Officer Edwards and Lt. Barnett left the victim's apartment; he locked the front door and began processing the scene. He seized one more paper towel, the telephone touched by the assailant, and the victim's purse. He then dusted the apartment for fingerprints. On the interior side of the front door he photographed and lifted a palm print located slightly above the doorknob. Captain Mobley also photographed and lifted a print from the outside of the front door. The inside palm print was later identified as that of appellant.

Appellant was arrested on the afternoon of December 31, 1989, at his father's home in York, and denied ever having been inside the victim's apartment. When the police arrived, appellant was wearing a black hooded sweatshirt, underwear, and socks. He dressed in jeans

before being transported by the police. While he was dressing, Officer Boot Smith noticed a tank top that appeared to have blood on it and asked if the police officers could take it. Appellant consented and stated the blood tame from a fight he had been involved in the night before at a bar.

Forensic evidence linked appellant to the crime scene. In addition to the palm print found on the victim's door, the State introduced evidence that:

> (1) fibers consistent with a black sweatshirt owned by appellant were found on the victim's bed sheets;
>
> (2) a blue acrylic fiber was found on the victim's pink nightgown, and another on appellant's blue jeans: they "could have come from the same common source or it could have come from different sources, but indeed they do . . . match each other;"
>
> (3) microscopically consistent fibers were found on the pink nightgown and, in the form of a "fiber pill," on appellant's underwear;
>
> (4) appellant's underwear contained a mixture of DNA from two individuals and 99.99% of the population other than appellant and the victim were excluded as contributors to that mixture; and
>
> (5) appellant's tank top was found to contain a mixture of his blood and the victim's blood.

The defense theory was two fold. First, it sought to discredit the forensic evidence by showing the evidence was mishandled and by demonstrating the many opportunities for contamination because of unprofessional errors.

The defense also sought to suggest that the alleged contamination was not merely the result of simple negligence, but part of a plot on the part of certain law enforcement officers to see that appellant was convicted of these crimes. In connection with this prong of the defense strategy, appellant sought to introduce evidence of third party guilt.

ISSUE

Whether the circuit court erred by refusing to admit evidence of third party guilt?

DISCUSSION

At a pretrial hearing, appellant proffered evidence of third party guilt. Specifically, he sought to introduce evidence at trial that the crimes were actually committed by Jimmy McCaw White (Jimmy).

1. Pre-trial testimony

Like appellant, Jimmy is a black male. At the time of the victim's murder, he was twenty-two years old; appellant was eighteen. Jimmy's hair was longer than appellant's and Jimmy had lighter skin than appellant.

Several witnesses placed Jimmy in the victim's neighborhood near 6 a.m. on December 31, 1989. Frenetta Johnson testified she saw Jimmy going toward the apartments where the victim lived between 4:30 and 5:30 a.m. Later in her testimony, she narrowed the time to "from four-thirty to something to five." Meshelley Gilmore testified she observed Jimmy in an apartment parking lot as she drove away from her home at about 3:30 or 4 a.m., and that he was still there when she returned at 4:30-4:45 a.m. These

apartments were near the victim's complex. Mrs. Gilmore was awakened by a police officer knocking on her door at 7:30 a.m. She told him she had seen Jimmy hanging around the parking lot earlier that morning.

Deloris Brown testified she saw Jimmy walking down the victim's street in the direction of the victim's apartment between 4 and 5 a.m. on December 31, 1989. Eighty-seven-year-old Anna Boyd, a resident of the same apartment complex as the victim, testified that someone knocked on her door during the night of December 30-December 31. The knocker said, "Open the door, my man, this is Jimmy, open the door." These are appellant's "proximity" witnesses.

Appellant also presented several witnesses who testified that Jimmy had acknowledged that appellant was "innocent" or to whom Jimmy had admitted his guilt. Thomas Murray testified that Jimmy said he knew appellant was innocent, and that he (Jimmy) could not be brought to court for it. Ken Rhodes testified he asked Jimmy whether the word on the street, that Jimmy was the victim's murderer, was true and that Jimmy "put his head down and he raised his head back up and he said well, you know, I like older women . . . and he never called the lady's name but you know he say that he liked old women and that yeah he did what they say he did and you know that somebody else was locked up for it. And you know it's like he didn't have no regrets about it at all." Rhodes went on to testify that "[Jimmy] didn't say exactly what he done, he just told me that she had some good stuff. . . . He said that he didn't kill the lady. The lady was alive when he left. . . ."

Mattie Mae Scott testified that in October 1997 she was at her son's house when Jimmy came to visit. Jimmy was "partially intoxicated," and when the others began talking about the 'old lady in York' that Jimmy had raped and murdered, Jimmy said, "Yes, I did it but [appellant] is going to fry for it."

The defense's "star witness" was Stephen Westbrook.[6] He testified that in 1990 and again in 1994 Jimmy told him he had broken into the victim's house and raped her. Jimmy told Westbrook that Officer Boot Smith[7] had told Jimmy to keep quiet about his guilt. Westbrook further testified that Officer Smith and Investigator Potts came to see Westbrook before appellant's first trial and offered to get him out of jail if he would testify that appellant had confessed to him. Westbrook testified that in June 2000, about two months before this pretrial hearing, he was brought to Rock Hill from Kirkland Correctional Institute. In Rock Hill, he was confronted by several employees of the solicitor's office who sought to convince him to testify against appellant in the upcoming second trial. Westbrook stated that the solicitor's office employees acknowledged to him that they had manufactured underwear evidence incriminating appellant. Westbrook also testified that Jimmy told him that Officer Smith was out to "frame" appellant, and that even appellant's former attorney had urged him to testify against appellant. Finally, Westbrook testified an employee of the solicitor's office stated that, in addition to the manufactured underwear evidence, they had lifted one of appellant's palm prints from the county

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[6] Westbrook's credibility was called into question by cross-examination and by impeachment.

[7] Boot Smith was deceased at the time of this trial.

jail door to use against him at trial. These are appellant's "confession" witnesses.

Further, the defense called a witness who testified that when asked why he would not confess, Jimmy told him "it's all over and done with and [appellant] is going to do the time for it."

The former receptionist at the York Public Defender's Office testified that Jimmy brought up the crime in conversation with her one day, and remarked that he did not believe appellant was guilty, that maybe Jimmy knew who did it, and that everybody on the street knew.

Finally, the defense called Jimmy to testify at the pretrial hearing. The trial judge instructed Jimmy he had the right to remain silent and the right to an attorney, and warned Jimmy that anything he chose to say could be used against him. Jimmy declined the offer of an attorney and opted to testify. Jimmy testified he left York and was home in Sharon by 2 a.m. on December 31, 1989. He claimed to have ridden with Junior Lytle. Lytle, however, testified at the pretrial hearing and denied driving Jimmy home to Sharon that night. Jimmy denied telling Stephen Westbrook that he had raped and killed the victim and denied confessing in the presence of Thomas Murray or John Dixon or telling the York Public Defender's receptionist that he knew who killed the victim.

2. Standard for admitting third party guilt

We have held that a defendant seeking to present evidence of third party guilt must meet this standard:

> [T]he evidence offered by accused as to the commission of the crime by another person must be

> limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.

State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) (citing 16 C.J. 560).

The *Gregory* court went onto cite from 20 Am. Jur. 254:

> But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy do say to the jury that some one other than he is more probably guilty.

Id., 198 S.C. at 104-105, 16 S.E.2d at 535. Further, in *State v. Gay,* 343 S.C. 543, 541 S.E.2d 541 (2001), we held that where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence.

Appellant fails to meet the standard set out in *Gregory* and *Gay* due to the strong evidence of his guilt. He simply cannot overcome the forensic evidence against him to raise a reasonable inference of his own innocence. This evidence included: (1) appellant's palm print was found just above the door knob on the interior side of the front door of the victim's house; (2) fibers consistent with a black sweatshirt owned by appellant were found on the victim's bed sheets; (3) matching blue fibers were found on the victim's pink nightgown and on appellant's blue jeans; (4) microscopically consistent fibers were found on the pink nightgown and on appellant's underwear; (5) appellant's underwear contained a mixture of DNA from two individuals, and 99.99% of the population other than appellant and the victim were excluded as contributors to that mixture; and (6) appellant's tank top was found to contain a mixture of appellant's blood and the victim's blood.[8]

Further, besides the forensic evidence, there was evidence that appellant matched the description of the perpetrator given by the victim and there was evidence that appellant was fleeing from police officers and was in

[8] Although appellant claims the forensic evidence was mishandled and therefore was inadmissible, the fact the forensic evidence may have been compromised by the unprofessional manner in which the evidence was collected goes to the weight of the evidence, not to its admissibility. *See State v. Carter*, 344 S.C. 419, 544 S.E.2d 835 (2001) (weak links in chain of custody go to weight, not admissibility); *State v. Smith*, 326 S.C. 39, 482 S.E.2d 777 (1997) (storage of blood sample in police officer's home goes to weight of evidence not its admissibility). In any event, appellant's claims do not eviscerate all of the forensic evidence. For example, appellant's claims do not eliminate the fact that consistent fibers were found on both his clothing and the victim's clothing and sheets or the fact that 99.99% of the population other than appellant and the victim were excluded as contributors to the mixture found in appellant's underwear.

the area of the victim's house prior to the time she was attacked.

Regarding appellant's claim that he should have been allowed to present evidence that Jimmy White may have been the perpetrator of the crimes, the State proffered the testimony of a Federal Bureau of Investigations forensic examiner. This examiner testified that, after testing Jimmy White's specimen, *i.e.* a dried bloodstain, and comparing the specimen to the clothing items that were tested as part of the investigation, White was excluded.

Given the overwhelming evidence of appellant's guilt, the circuit court did not err by excluding the evidence of third party guilt.

CONCLUSION

Appellant's remaining issues are without merit and we dispose of them pursuant to Rule 220(b), SCACR. *See Issue I*: *State v. Council*, 335 S.C. 1, 515 S.E.2d 508, *cert. denied*, 528 U.S. 1050 (1999) (whether juror is qualified to serve on death penalty case is within discretion of trial court and is not reviewable on appeal unless wholly unsupported by the evidence; responses of challenged jurors must be examined in light of entire voir dire); *Issue IV*: *State v. Johnson*, 338 S.C. 114, 525 S.E.2d 519, *cert. denied*, 531 U.S. 840 (2000) (appellate court will not disturb trial court's ruling concerning scope of cross-examination of a witness to test his or her credibility absent manifest abuse of discretion); *see also State v. Beckham*, 334 S.C. 302, 513 S.E.2d 606 (1999) (trial court erred by not admitting impeachment evidence after officer denied he had investigated two suspects different from the defendant; however, error found to be harmless); *Issue VI*:

State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996), *cert. denied*, 520 U.S. 1268 (1997) (contemporaneous objection required to preserve issue for appellate review); *Issues VII and VIII*: *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999), *cert. denied*, 529 U.S. 1025 (2000) (capital defendant may present as mitigating evidence (1) any aspect of defendant's character or record and (2) any circumstances of the crime that may serve as a basis for a sentence less than death); *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994), *cert. denied*, 513 U.S. 1166 (1995)[9] (residual doubts are not a mitigating factor in sentencing); *Issue IX*: *Ohio v. Roberts*, 448 U.S. 56 (1980), *overruled on other grounds by Crawford v. Washington*, ___ U.S. ___, 124 S.Ct. 1354 (2004) (properly administered the business and public records exceptions are among the safest against a Confrontation Clause challenge of the hearsay exceptions); Rule 1006, SCRE (contents of voluminous records may be presented in form of a summary provided underlying data are admissible into evidence); *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683, *cert. denied*, 519 U.S. 1045 (1996) (prison disciplinary records admissible under Uniform Business Records as Evidence Act, S.C. Code Ann. § 19-5-510 (1985); *Issue XI*: *Payne v. Tennessee*, 501 U.S. 808 (1991) (victim impact evidence is admissible in a capital sentencing proceeding); *Neill v. Gibson*, 278 F.3d 1044 (10th Cir. 2001), *cert. denied*, 537 U.S. 835 (2002) (no *ex post facto* violation in allowing victim impact evidence when crime occurred in 1984); *Issue XII*: *State v. Humphries*, 325 S.C. 28, 479 S.E.2d 52 (1996), *cert denied*, 520 U.S. 1268 (1997) (contemporaneous objection required

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[9] *Overruled on other grounds by State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995).

to preserve issue for appellate review); *Issue XIII*: *State v. Stroman,* 281 S.C. 508, 316 S.E.2d 395 (1984) (party cannot complain of error which his own conduct has induced); *Issue XV*: *State v. Weik,* 356 S.C. 76, 587 S.E.2d 683 (2002), *cert. denied,* 539 U.S. 930 (2003) (issues cannot be raised for the first time on appeal); *State v. Saltz,* 346 S.C. 114, 551 S.E.2d 240 (2001) (admission of evidence is in trial court's discretion and will not be disturbed on appeal absent an abuse of discretion).[10]

Proportionality Review

Under State law, S.C. Code Ann. § 16-3-25(C)(3) (1985) requires this Court to determine in a death case "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." There is no requirement the sentence be proportional to any particular case; however, death sentences have been imposed in similar cases. *See State v. Simmons,* ___ S.C. ___, 599 S.E.2d 448 (2004); *State v. Terry,* 339 S.C. 352, 529 S.E.2d 274, *cert. denied,* 531 U.S. 882 (2000); *State v. Council,* 335 S.C. 1, 515 S.E.2d 508, *cert. denied,* 528 U.S. 1050 (1999); *State v. Whipple,* 324 S.C. 43, 476 S.E.2d 683, *cert denied,*

[10] As for Issue XIV, appellant's argument is based upon a factual error. Appellant argues the trial court erred by permitting the State to cross-examine a social worker using records from his stay in Gilliam Psychiatric Hospital in 2000. However, the trial court in fact denied the State's request to cross-examine the social worker and the State did not ask any questions regarding the 2000 Gilliam records. Because the Record on Appeal does not support appellant's assertion, we do not address his argument. *See State v. Sinclair,* 275 S.C. 608, 274 S.E.2d 411 (1981) (where appellant obtained only relief he sought, this court has no issue to decide).

519 U.S. 1045 (1996). Accordingly, appellant's sentence is not disproportionate under State law. The judgment of the circuit court is **AFFIRMED.**

TOAL, C.J., WALLER, J., and Acting Justice John W. Kittredge, concur.

PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES:

I respectfully dissent, and would find the circuit court erred in refusing to allow appellant to introduce evidence of third party guilt in the guilt phase of the trial. I would therefore reverse and remand for a new trial.

The majority and I agree on the third party guilt evidence proffered by appellant. In my view, the proffer met the standard established by *State v. Gregory,* 198 S.C. 98, 16 S.E.2d 532 (1941). The majority, relying on *State v. Gay,* 343 S.C. 543, 541 S.E.2d 541 (2001), concludes that the third party guilt evidence was properly excluded. I find *Gay* distinguishable.

In *Gay,* the Court affirmed the exclusion of evidence of third party guilt because the State's case, particularly the forensic evidence, was so strong that it admitted of no "reasonable inference" regarding the defendant's innocence. The present case is distinguishable from *Gay* in several important particulars. First, the validity of the forensic evidence was not called into question in *Gay.* Here, appellant presented evidence of mishandling, for example the collection of evidence at the scene using grocery bags from the victim's kitchen, the mislabeling of samples at the lab, and the loss of all blood samples collected from the victim. Further, appellant proffered evidence that representatives of the State had admitted

manufacturing blood and palm print evidence against him. Finally, unlike the defendant in *Gay*, appellant proffered both "proximity" witnesses and "confession" witnesses. Considering the record as a whole, the State's evidence was not sufficient to negate the "reasonable inference" of appellant's innocence arising from appellant's proffer.

I would reverse and remand for a new trial.

[SEAL]

THE SUPREME COURT OF SOUTH CAROLINA

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December 1, 2004

Acting Deputy Chief Attorney Wanda P. Hagler
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1205 Pendleton Street, Rm. 306
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Re: The State v. Holmes, Bobby Lee

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

/s/ Jean H. Toal C.J.

/s/ James E. Moore J.

/s/ John H. Waller, Jr. J.

Justice E. C. Burnett, III, not participating

I would grant rehearing.

/s/ Costa M. Pleicones J.

December 1, 2004."

The remittitur is today being forwarded to the lower court.

Very truly yours,

/s/ [Illegible]
CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka
The Honorable Thomas E. Pope

Supreme Court, U.S.
FILED
NOV 30 2005
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No. 04-1327

In The
Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

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QUESTION PRESENTED

In South Carolina, a criminal defendant's evidence of third-party guilt is inadmissible if, when comparing this evidence standing alone against the prosecution's evidence, the trial court finds that it fails to create a reasonable inference of innocence. In making this comparison, if the trial court finds the prosecution's evidence – and especially its forensic evidence – to be "strong," third-party guilt evidence is per se inadmissible because it is deemed, as a matter of law, to be insufficient to "overcome" the prosecution's evidence so as to create a reasonable inference of innocence.

1. Whether South Carolina's rule governing the admissibility of third-party guilt evidence violates a criminal defendant's constitutional right to present a complete defense grounded in the Due Process, Confrontation, and Compulsory Process Clauses?

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Akhil Reed Amar, *America's Constitution: A Biography* (2005) 25

4 Blackstone, *Commentaries* 25

Peter Brooks, *Narrativity of the Law*, 14 LAW & LITERATURE 1 (2002) 40

Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713 (1976) 38

1 Sir Edward Coke, *The First Part of the Institutes of the Laws of England* (Hargave and Butler, 16th ed. 1809) 25

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JURISDICTION

The South Carolina Supreme Court entered judgment on November 1, 2004, and denied a timely petition for rehearing on December 1, 2004 (App. 371-72). Bobby Lee Holmes filed a petition for certiorari on March 31, 2005 (timely under the extension of time that this Court approved on February 17, 2005), and this Court granted the petition on September 27, 2005. On October 14, 2005, this Court granted Holmes an extension until November 30, 2005 to file this brief. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV.

The Sixth Amendment of the Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ; to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.

STATEMENT OF THE CASE

A. The Assault and the Victim's Description of Her Assailant

On December 31, 1989, between 6 and 7 a.m., eighty-six year old Mary Stewart was beaten, raped, and robbed in her York, South Carolina home, sustaining injuries that would eventually lead to her death. App. 355-56. After her attacker departed, Ms. Stewart returned a call from her friend Maggie Thrasher and reported that she had been assaulted by "a dark chunky fellow," "kind of short [and] dark skinned." App. 141-42. Thrasher contacted Alaine Byers, another friend of Ms. Stewart's, who had a key to her apartment. App. 142. Byers reached Ms. Stewart's apartment around 8 a.m. and found her in her bedroom. App. 142-43. When Byers asked who had attacked her, Ms. Stewart replied, "I don't know who he was. All I know is he was big and dark." App. 143-44.

After being contacted by Byers, three officers from the York City Police Department responded to the crime scene, arriving around 8:15 a.m. App. 144, 156-57. As the police began collecting evidence, Ms. Stewart was taken to the hospital where she described her assailant to a nurse as in his "late twenties." App. 149. Sometime later in the morning, Ms. Stewart also gave Lieutenant Wilson Barnett a taped statement. App. 157. She told Barnett that her assailant was wearing a blue or black sweatshirt, with the caveat that she could not see well without her glasses. App. 160-61. Ms. Stewart further described her assailant as "middle aged. He was young. He was not too young. And he, as I remember, his hair was not short and not too long . . . [his hair was] kind of long. Not too long, but a little longer than you [Lieutenant Barnett] usually wear it." App. 159-60.

B. Holmes Becomes the Prime Suspect Even Though No Evidence Links Him to the Crime

Earlier that same morning, about 5:00 a.m., York Police Officer Grady Harper had been dispatched to break up a disturbance at the Cannon Court Apartments, located roughly a mile from Ms. Stewart's home. App. 163-64. Harper found Bobby Lee Holmes and another man in an argument, surrounded by onlookers. App. 164-65, 175-76, 256-57, 271-72. Harper asked the group to disperse, and most did, but Holmes chose instead to taunt Harper with what Harper described as "a few choice words." App. 165-66, 172-73. Harper then called for back up, intending to arrest Holmes, who had been in some scrapes with the law before. App. 166. As soon as additional officers arrived, Holmes ran. App. 166, 175-76, 257-58. After hiding behind a brick wall, he managed to flag down and jump into a friend's car. App. 169-70. Within minutes, however, Harper caught sight of Holmes and initiated a traffic stop of the car in which he was riding. App. 169-70, 178, 259-60. Once again, Holmes ran, this time eluding both Harper and a second set of officers called to join the chase. App. 170-72, 174-75, 259-60. The police last reported seeing Holmes at 5:20 a.m. (roughly an hour before Ms. Stewart's assault), nearly a mile from Ms. Stewart's apartment running in the opposite direction from it. App. 173, 175.

By 11:30 a.m., the police identified Holmes – the man who had so frustrated them in the early morning – as the prime suspect in the attack on Ms. Stewart. App. 183. At the time, the police had no physical evidence linking Holmes to the crime and no witnesses placing Holmes near Ms. Stewart's apartment at any time, much less near the time of the assault. App. 206-07. (Indeed, no such witness ever has emerged). App. 207. To the contrary, the police had a physical description from the victim – middle-aged with longish hair – that did not match Holmes, who had just turned eighteen years old and had close-cropped

hair. App. 179, 208-09, 327-28. (In particular, Holmes had shorter hair than Lieutenant Barnett, who, according to Ms. Stewart, had shorter hair than her assailant). App. 159, 208-09. The police also had received information from at least two of Ms. Stewart's neighbors that a man with a long police record named Jimmy White had been on Ms. Stewart's street around the time of the assault. App. 14-15, 96-99; *see also* App. 29-33. White was older than Holmes, sported longer hair (thus more closely resembling the description Ms. Stewart gave of her attacker), and also had a history of violence, including an attack against an older woman (in contrast to Holmes, whose arrest record was not remotely comparable). App. 14, 74-82, 131, 199.

Nonetheless, during the afternoon of December 31, two York police officers went to Holmes' residence to arrest him, not for the assault on Ms. Stewart, and not even for his conduct early that morning when he ran from the police, but for a completely unrelated theft. App. 179-80, 183-88. Two months later, the State charged Holmes with the Stewart crimes,[1] and then prosecuted him based mainly on forensic evidence.

C. Holmes' Proffer of Relevant and Competent Evidence That a Third Party, Jimmy White, Committed the Stewart Crimes

Holmes consistently proclaimed his innocence, App. 209, 253-54, 270, and intended at trial to raise a reasonable doubt as to his guilt based in large part on evidence that Jimmy White actually had attacked and killed Ms. Stewart.[2] This evidence would serve two related functions.

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[1] Indictment for Criminal Sexual Conduct, Feb. 26, 1990; Indictment for Robbery, Feb. 26, 1990; Indictment for Burglary, Feb. 26, 1990; Indictment for Murder, Apr. 9, 1990 (following Ms. Stewart's death).

[2] This was in fact a retrial for Holmes. His initial trial, held in April 1993, ended in conviction on all counts. *See State v. Holmes*, 464 S.E.2d 334

(Continued on following page)

First, because it was undisputed that Ms. Stewart was assaulted by only one person, the evidence that Jimmy White committed the crime directly supported Holmes' claim of innocence. Second, the third-party guilt evidence bolstered Holmes' contention that the State's forensic case against him was unreliable because it stemmed from an investigation in which the police had either mishandled key items of evidence or had planted evidence in order to reinforce their initial decision to pin the crime on Holmes.

At a pretrial hearing, Holmes proffered substantial evidence pointing to White's guilt. As a starting point, Holmes produced four "proximity" witnesses, neighbors of Ms. Stewart, all of whom saw White haunting the very same block where Ms. Stewart lived shortly before 6 a.m. on the morning of the assault. App. 360-61. Frenetta Jamison testified she saw White going toward the apartments where the victim lived between 4:30 and 5:30 a.m., a time frame she eventually refined to "from four-thirty to something to five." App. 5-9. Meshelley Gilmore testified she observed White in the apartment parking lot across from Ms. Stewart's home as she drove away from her home at about 3:30 or 4 a.m., and that he was still there when she returned at 4:30-4:45 a.m. App. 9-14. Delores Brown testified she saw White walking down the victim's street in the direction of the victim's apartment between 4 and 5 a.m. App. 95-98. Eighty-seven-year-old Annie Boyd, who lived nearly adjacent to Ms. Stewart, testified that someone knocked on her door during the night of December 30-December 31. App. 28-32. The knocker said, "Open the door. . . . My man, this is Jimmy, open the door." App. 30.

(S.C. 1995). But that outcome was overturned in state post-conviction proceedings because of the trial court's failure to secure a valid waiver of Holmes' right to make a closing argument and previous trial counsel's failure to advise him that he had such a right. *Holmes v. Moore*, 96-CP-46-966, Order (Jan. 15, 1998).

All these witnesses were independent of each other. Three knew White well enough to identify him confidently by sight. App. 7-8, 12, 96-97. (The other witness, Boyd, implicated White by describing the knocker's self-identification as "Jimmy"). App. 30. And two of the witnesses even told police on the morning of the attack that White was in the right place at the right time to have committed the crime. App. 14-15, 98-99.

Next, Holmes offered the testimony of four independent and mutually corroborating witnesses who heard White say that he was the person who had assaulted Ms. Stewart. App. 135. Steven Westbrook provided the most comprehensive testimony. According to Westbrook, while they were incarcerated together, White had confessed both that he had assaulted Ms. Stewart and that Officer James "Boot" Smith (who, according to Westbrook, harbored a grudge against Holmes) had told White to keep quiet about the case. App. 38-43. In addition, Westbrook said that Smith had approached him to testify falsely against Holmes and that employees of the prosecutor's office, in the course of soliciting his cooperation, spoke of manufacturing key evidence incriminating Holmes. App. 43-51. This trumped-up evidence, Westbrook stated, included blood evidence from Holmes' underwear and a palm print allegedly taken from Ms. Stewart's apartment door, which, according to Westbrook's account, actually came from a print Holmes left on a door at the county jail. App. 50. Westbrook also stated that Smith had threatened him if he testified on Holmes' behalf.[3] App. 51.

[3] Smith died long before Holmes' trial and was, thus, unavailable to be examined on these matters. App. 188.

Thomas Murray, Mattie Mae Scott, and Ken Rhodes each testified that White had told them that he, not Holmes, had assaulted Ms. Stewart. App. 105-07, 113-15, 117-24. Rhodes, for example, recounted that when he asked White about the "word on the street" that he was responsible for Ms. Stewart's murder, White "put his head down and he raised his head back up and he said well, you know, I like older women .... and he never called the lady's name but you know he say that he liked older women and that yeah he did what they say he did and you know that somebody else was locked up for it. And you know it's like he didn't have no regrets about it at all." App. 119-20. In his statements to Rhodes, moreover, White described Ms. Stewart as being alive when he left the apartment, thereby showing a detailed familiarity with the crime.[4] App. 120-21.

In his own testimony at the pretrial hearing, White also incriminated himself by giving a false alibi. In his testimony (as well as in an earlier statement to police), White admitted that he was in Ms. Stewart's neighborhood on the night in question, but claimed that he had returned to his home in Sharon, South Carolina more than four hours before the assault. App. 80-86. According to White, he received a ride home that night from an acquaintance named Joshua Lytle. App. 82-85. This claimed alibi, in addition to directly contradicting the proximity witnesses, was refuted by Lytle, who testified (as he had told the police earlier) that he did not take White back to Sharon. App. 134-35. White also denied ever confessing to the Stewart crimes, App. 88-90, thereby pitting his credibility against that of all the confession witnesses.

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[4] Two other witnesses, John Dixon and Nancy Bennett provided further corroboration for the four confession witnesses. Both described conversations in which White, at least indirectly, suggested that he, not Holmes, was guilty of the crime against Ms. Stewart. App. 36-37, 100-03.

Finally, Holmes offered evidence that White – whose physical appearance more closely matched Ms. Stewart's physical description of her assailant than did Holmes – had a penchant for older women and was prone to violent relationships.[6]

D. The Trial Court Finds the Third-Party Guilt Evidence Probative of Innocence Yet Rules It Inadmissible

At the pretrial hearing, the prosecutor subjected each of these third-party guilt witnesses to extensive cross-examination. Despite these efforts, the trial court found the witnesses' testimony to have sufficient probative value as to Holmes' innocence to be admissible. Specifically, the trial court concluded that Holmes' proximity witnesses created an evidentiary basis from which a jury could find that White was in the right place at the right time to have committed the crime. App. 134. It also found that Lytle's testimony denying that he gave White a lift supported the proximity witnesses and that a jury could credit Lytle's repudiation of White's purported alibi. App. 134-35. The trial court further ruled that four separate witnesses provided testimony from which a jury could find that White, despite his in-court denial, did confess to beating

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[6] The evidence included the following: (1) Ken Rhodes' testimony that White liked older women; (2) Jimmy White's testimony that he had a history of violence against women, including striking a woman in the face and pushing his girlfriend to the ground (both incidents resulted in criminal convictions); and (3) a psychological evaluation of White concluding that he bore scars from physical altercations with both women and men and that he had sexual fantasies of dominance and control causing him to behave inappropriately and unpredictably. App. 74-80, 90-93, 121-22, 132.

and raping Ms. Stewart. App. 135.[6] The court also found that Holmes had presented testimony that "could be taken as evidence of a penchant for older women by Jimmy McCaw White," though the court considered this evidence "marginal." *Id.*

Nonetheless, the trial court excluded all of Holmes' proffered third-party guilt evidence. App. 137. It ruled that the most telling evidence – the testimony as to White's multiple confessions – was inadmissible hearsay. App. 135-37. Without the confession evidence, the court continued, the remaining third-party guilt evidence was insufficient to show "facts or circumstances which clearly point to Mr. White . . . as the person guilty of the beating and rape of Mary Stewart." App. 137. Absent such a showing, the court concluded, the evidence did not meet South Carolina's standard for admitting evidence of third-party guilt. App. 136-37.

As a result, Holmes was forced to proceed without the core evidence supporting his innocence defense. Instead of being able to present direct evidence (including multiple confessions) of an affirmative alternative to his own guilt, Holmes could only partially illuminate the inadequacies and anomalies of the police investigation and the forensic evidence it produced.

E. The Police Investigation

The police investigation began at Ms. Stewart's apartment when the police arrived shortly after 8 a.m. on December 31. App. 156-57. Officer Dale Edwards collected Ms. Stewart's nightgown, robe, and slippers from the bathroom floor (where Ms. Stewart had dropped them)

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[6] Later, during the trial, the judge candidly stated that the confession testimony continued to "bother" him because it rose "to the level of raising some question" about Holmes' guilt. App. 140-41.

and placed all of them inside a single used paper grocery bag obtained from Ms. Stewart's kitchen. App. 146-48. Edwards assisted Lieutenant Barnett in folding the bed sheets, which, together with the pillow cases, they placed in another used grocery bag. App. 145, 157-58. Edwards also retrieved from Ms. Stewart a paper towel that she said had evidence on it. App. 146-48. During this evidence retrieval and collection, neither Edwards nor Barnett wore gloves. App. 148, 157-58.

Outside the apartment, another officer ran a bloodhound around the perimeter of the Stewart's apartment building. App. 161. The search yielded a man's tank top on a path leading from the apartments to a street circling the parking lot for the complex. App. 162-63. Although the police sent this evidence to the State Law Enforcement Division ("SLED") for forensic analysis, it was never tested for semen or DNA. App. 345-53.

Around 8:45 a.m., Captain William Mobley arrived to take charge of the investigation. App. 206. After locking the door to Ms. Stewart's apartment, he decided to process the crime scene by himself. App. 180, 206-07. Mobley testified that, in addition to taking photographs, he dusted the apartment and its contents for fingerprints, including the telephone and pocketbook that Ms. Stewart said her assailant had touched. App. 159, 180-81. On these, Captain Mobley purportedly found only smudges. App. 181-83. Indeed, at trial, Captain Mobley would claim that in the entire apartment – which belonged to an eighty-six year-old retiree and had been traipsed through by un-gloved police officers, neighbors and paramedics – he found just two usable prints. App. 143-44, 148, 157-58, 180-82. The first was a partial palm print that he claimed to have lifted from the interior of Ms. Stewart's door. App. 182. The second print was purportedly taken from the exterior of the door. *Id.* Captain Mobley also discovered a footprint, though he omitted it from his diagram of the crime scene. App. 205-06.

At 2 p.m., Captain Mobley and Officer Smith drove to the hospital where Ms. Stewart was initially admitted to pick up the rape kit containing vials of her blood. App. 151-53, 188. The rape kit, however, was both incomplete and compromised. Because of Ms. Stewart's condition, the nurse did not perform a pelvic exam; nor did she take fingernail scrapings. App. 152-53. Most important, the vacutainers she used to collect Ms. Stewart's blood had long since passed their expiration date, thus rendering the blood useless for DNA testing. App. 153, 243-44, 249, 301-02. Although law enforcement officers later obtained a second, more complete rape kit, it disappeared altogether. App. 154-55, 240-41, 299, 351.

By this time, Captain Mobley had made the decision to designate Holmes the prime suspect in the Stewart attack even though he had no evidence that Holmes engaged in any wrongdoing other than participating in a disturbance nearly a mile from Ms. Stewart's home that morning. Nor did Captain Mobley and Smith seek to justify their suspicion by taking the obvious preliminary step of showing Ms. Stewart a photo array with Holmes' picture so that she might identify him if, in fact, he was the assailant. App. 160, 206-07. Instead they went to Holmes' father's house to arrest him in connection with an unrelated theft. App. 179-80, 183-85, 188, 264. After finding Holmes in his bedroom wearing a black-hooded sweatshirt and a pair of briefs, the officers took him into custody and seized some of his clothes. App. 185-86.

F. The Prosecution's Forensic Case and Holmes' Defense

Lacking eyewitness testimony linking Holmes to the attack on Ms. Stewart, the State based its prosecution almost entirely on "forensic" evidence. Specifically, the State argued that the following evidence tied Holmes to the crime: (1) three sets of allegedly "consistent" but

common fibers found on Ms. Stewart's and Holmes' clothing, App. 359; (2) DNA allegedly (but inconclusively) belonging to Ms. Stewart and Holmes derived from blood taken off a paper towel found in Ms. Stewart's apartment, and off Holmes' underwear and shirt that the police had seized, App. 243-45; (3) Holmes' palm print allegedly found on the interior of Ms. Stewart's door, App. 359; and (4) money ($44 in various denominations) found in Holmes' wallet that roughly coincided with an amount ($40) allegedly taken from Ms. Stewart, App. 142, 187-88.

In light of the trial court's ruling that he could not present an affirmative case arguing Jimmy White's guilt, Holmes prepared a three-prong defense.

First, he intended to attack his prosecution as a rush to judgment, the result of a sloppy investigation that failed to pursue other leads, such as the tank top found near the scene and the footprint found at the scene.

Second, Holmes planned to attack the prosecution's "forensic" evidence. Specifically, he intended to raise a reasonable doubt as to his innocence with evidence that the blunders in the collection of evidence compromised the testing; that in any event the forensic test results were inconclusive; and, finally that, regardless of the test results, the blood evidence had been planted by Captain Mobley, the senior officer who arranged to handle all the physical evidence himself, unobserved, and who "discovered" some of the most incriminating evidence after locking everyone else out of Ms. Stewart's apartment.

And third, Holmes planned to highlight the inherent implausibility of the State's account that a young man being chased by the police raced nearly a mile across town to break into a randomly chosen apartment and rape an elderly woman.

The trial court initially ruled that Holmes could use the third-party guilt evidence regarding Jimmy White for the limited purpose of cross-examining the State's police witnesses about their investigation, including asking why the police – having been told that White, a felon with a history of violence toward elderly women, had been near Ms. Stewart's apartment around the time of the assault – decided not to test the footprint found at her apartment against White (it did not match Holmes) or to test White's clothes for the victim's blood. App. 140-41, 198-200. But just before the defense began its cross-examination of police witnesses, the court reversed course and denied the defense any use of the third-party guilt evidence whatsoever. App. 200-02. The result of this ruling was to limit Holmes' defense mainly to expert testimony attacking the State's forensic evidence collection and testing, as well as a circumstantial case raising the possibility of a police frame-up.

In beginning this severely constrained defense, Holmes presented testimony that the methods the police used to collect evidence created a severe risk of evidence contamination. Holmes also presented testimony that the DNA evidence was planted by the police. Much of the "forensic evidence" was consistent with Holmes' defense that, having been designated the prime suspect because he had angered the York police on the morning of the crime, the investigating officers framed him for the attack on Ms. Stewart. In particular, Holmes' defense focused on the questionable conduct of Captain Mobley.

1. Fiber Evidence

As a threshold matter, Holmes' expert testified that fiber evidence, even when properly collected, has little inherent probative value. App. 321-24. In the expert's view, moreover, the evidence collection in this case was anything but proper. The officers who gathered evidence from Ms. Stewart's home conceded that they did not wear gloves

while collecting the evidence and placing it in used paper bags from Ms. Stewart's kitchen. App. 146-48, 157-58. After all the evidence was collected, Captain Mobley created evidence logs. App. 189-91. He testified that while creating the logs he went through all the evidence from the case simultaneously, including both Stewart's and Holmes' items, without wearing gloves and without washing his hands between handling individual items of evidence. *Id.* As defense expert John Kilbourn explained, fiber evidence is easily transferred. App. 313-15. Because Captain Mobley failed to wash his hands or put on new gloves between handling items of evidence obtained from Ms. Stewart and items of evidence obtained from Holmes, he could easily have transferred fibers between Holmes' items and Ms. Stewart's. *Id.*

The State's fiber analyst compounded the danger of contamination by using the "scraping method" to obtain the fiber samples. App. 227. This method involves hanging items of evidence in the air and using a metal instrument to scrape off fibers. App. 315-16. As Kilbourn testified, the scraping process often leaves fiber particles in the air, free to land on other items of evidence brought in for testing. App. 317-18. To minimize this well-known risk, fiber analysts typically scrape evidence from the suspect and the victim in separate rooms and on different days. App. 314-15, 317-18. A different analyst may even handle each item. App. 317-18. Here, the fiber analyst testified that he scraped evidence from Hol· .es' belongings and Ms. Stewart's belongings in the same room. App. 227. There is no evidence that he scraped the items on different days. Further, Kilbourn opined that two sets of the allegedly "consistent" fibers came from a third source, meaning that they did not come from Holmes' clothing or from Ms. Stewart's nightgown and bed sheets. App. 227-32. Yet the State made no effort to determine the source of these stray fibers. App. 230-32.

Defense experts also testified that the State's fiber analyst relied on imprecise and outdated methods to determine whether the fibers found on Holmes' clothing matched the fibers found on Ms. Stewart's bed sheets and nightgown. App. 316-23. After using a microscope to conclude that the material and general color of the fibers were consistent, the analyst failed to perform either an Optical Property Refractive Index test ("OPRI") or chemical analysis of the fibers' dye. App. 319-23. An OPRI test would have given the fiber analyst a more precise color match, while a chemical analysis of the dye could have more reliably shown that the fibers were consistent. App. 319-23.

2. DNA Evidence

As with the fiber evidence, Holmes introduced expert testimony that the DNA evidence taken from Holmes' underwear and shirt was compromised by the officers' careless handling. As two defense experts explained (and the prosecution's expert confirmed), officers can transfer DNA through such handling. App. 247, 299-300, 302-03. The relatively small amount of blood on Holmes' clothing, App. 236, was consistent with a cross-contamination theory that, if accepted, could have nullified the probative value of the DNA test results.

Holmes also presented circumstantial evidence that Captain Mobley planted the DNA allegedly found on Holmes' clothing and on the paper towel. During the investigation, Ms. Stewart's rape kit – which contained her blood, her vaginal swab, her rectal smear, and her saliva – disappeared. App. 154-55, 240-41, 299, 346. The missing blood samples and rectal smears, together with the blood sample the police took from Holmes, provided Captain Mobley with ample opportunity to plant Ms. Stewart's blood-derived DNA on Holmes' clothing and Holmes' blood-derived DNA on the paper towel. Despite

the disappearance of the rape kit and the self-evident concern about evidence tampering, the State failed to test the blood ultimately found on Holmes' clothing or the DNA ultimately found on the paper towel for the preservatives known to be in the missing blood samples. App. 248, 299-301. Such testing for preservatives is common practice when blood samples are missing because of the danger that they have been used to plant evidence. App. 299-301. The State offered no explanation for its failure to test for preservatives.

This omission was even more suspicious in light of the fact that the evidence log Captain Mobley generated when he originally collected the physical evidence made no mention of blood or other stains on Holmes' shirt or underpants, even though other evidence logs referenced the existence of blood or other stains on collected items. App. 193-95. While the evidence log does note blood on the paper towel, Captain Mobley did not turn the paper towel over to the South Carolina Law Enforcement Division (SLED) until eight days after he provided SLED with the rest of the evidence. App. 192-94. At trial, Captain Mobley failed to give a coherent explanation for failing to send the allegedly bloody paper towel promptly to SLED. App. 192-93.

Finally, Holmes' expert testified that the charts generated from the DNA mixtures from the blood on Holmes' shirt and underwear exhibited abnormal markings that SLED had improperly assessed in reaching its results. App. 304-10. In light of the unusual and unaccounted for markings on the charts, Holmes' expert opined that the evidence could not reliably establish that the DNA mixture came from Holmes and/or Ms. Stewart. App. 308-10.

3. Print and Money Evidence.

Holmes presented evidence that the palm print Captain Mobley allegedly found on the interior of Ms. Stewart's door was planted or came from another place. When a

person touches a rough or uneven surface, the surface creates striations in his or her print. App. 216-17. Both defense and prosecution experts agreed that the palm print attributed to Holmes contains striations indicative of a rough surface. App. 216-17, 326-27. According to defense expert and former SLED agent Donald Girndt, however, the interior of Ms. Stewart's door is not the type of surface that would create such striations. App. 325-27. Mobley's testimony regarding fingerprints was also dubious. For example, he claimed to have been able to lift only two usable prints from the whole apartment (App. 181-82) – an inherently implausible claim that was contradicted by prosecution expert and SLED Agent Steven Derrick. According to Derrick, if the police had used some of the more sophisticated available methods for collecting fingerprints (instead of just the rudimentary dusting technique employed by Mobley), they might have used the purportedly "smudged" prints taken from Ms. Stewart's telephone and pocketbook. App. 203-04, 218-22. These were items the assailant had touched, but which Mobley conveniently deemed unimportant and therefore dispensed with before trial. App. 159, 202-04. In addition, the donor of a second print found on Ms. Stewart's door was never identified, except that Holmes was ruled out. App. 210-11.

Finally, instead of testing the money found in Holmes' wallet for Ms. Stewart's prints, as could readily have been done according to defense expert Girndt, App. 192, 325, the State simply decided that Holmes' possession of the commonplace amount of $44 – in various denominations – somehow implicated him in the theft of $40 – in unknown denominations – from Ms. Stewart, App. 187-88.

G. In Closing Argument the Prosecutor Emphasizes the Absence of Third-Party Guilt Evidence

In closing argument at the guilt-or-innocence phase of the trial, the prosecutor, having successfully excluded

Holmes' evidence of third-party guilt, argued that Holmes' failure to introduce such evidence showed that he was the guilty party. On numerous occasions, the prosecutor remarked on Holmes' failure to introduce evidence that a third party committed the crime. App. 337-38. Summing up the point, the prosecutor explicitly stated, "if you are going to frame them (*sic*) and it's going to be Bobby Holmes, where is the raping, murdering, beating fellow that actually did this thing?" App. 338.

Holmes' counsel objected to the prosecution's tactics as soon as the prosecutor ended his closing argument and requested a mistrial. Pet. App. 26a-28a. Counsel argued that the prosecutor's remarks prejudiced Holmes because of the exclusion of the third-party guilt evidence, and that a new trial was necessary so that the evidence could be presented in response to the prosecution's comments. *Id.* at 28a-29a. When the trial court denied relief, *id.* at 29a, Holmes requested a special curative instruction, which was also ultimately denied, *id.* at 30a. The jury then convicted Holmes on all counts. App. 338-39.

At the sentencing phase, Holmes once again attempted to introduce the evidence of White's guilt. App. 341. Holmes maintained both that the information was relevant mitigating evidence and that its exclusion would amount to a denial of due process. Again, the trial court excluded the evidence. *Id.* The jury sentenced Holmes to death. App. 343-44.

H. The South Carolina Supreme Court Rules the Third-Party Guilt Evidence Inadmissible Because It Cannot "Overcome" the Prosecution's Forensic Case

On direct appeal, the South Carolina Supreme Court affirmed Holmes' conviction and sentence. App. 354. The court did not disturb the trial court's finding that Holmes had presented sufficient evidence from which a jury could

conclude that Jimmy White had the opportunity and motive to attack Ms. Stewart and that he had confessed to no fewer than four people. At the same time, the court disregarded the trial court's rationale for nonetheless excluding the evidence – namely, that the confession evidence was inadmissible hearsay.

As a starting point for its own reasoning, the court followed its precedents holding that, in order to be admissible, third-party guilt evidence must involve "a train of facts or circumstances as tends clearly to point out such other person as the guilty party" and, accordingly, that defendants are not permitted to introduce evidence that "can have no other effect than to cast bare suspicion on another" or that calls for "conjectural inferences" or "fanciful analogy."[7] App. 364. But the court then went much further than its prior holdings. It held that, in assessing whether a defendant's third-party guilt evidence meets this standard, a court must evaluate that evidence in light of the strength of the prosecution's entire case and admit the third-party guilt evidence only when it "overcome[s]" the prosecution's evidence to the point of "rais[ing] a reasonable inference of [the defendant's] own innocence." App. 365. The court further decreed that, when there is "strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." App. 364. In such circumstances, even third-party guilt evidence such as that presented in this case – evidence that, if believed, could easily raise a reasonable doubt as to Holmes' guilt – "cannot overcome the forensic evidence" and thus fails the test of admissibility as a matter of law. Despite Holmes' contention that the trial court's exclusion of the third-party guilt

[7] *State v. Gregory*, 16 S.E.2d 532, 534-35 (S.C. 1941); *State v. Gay*, 541 S.E.2d 541 (S.C. 2001).

evidence violated his Sixth, Eighth, and Fourteenth Amendment rights, the state court analyzed the matter solely as an issue of state law.[8] App. 363-66.

Judge Pleicones dissented. Although, like the majority, he did not follow the trial judge's hearsay ruling, Judge Pleicones shared the trial judge's view that the third-party guilt evidence raised a "reasonable inference" of Holmes' innocence. App. 369-70. For that reason, Judge Pleicones concluded that the evidence was admissible and, accordingly, he would have granted Holmes a new trial. *Id.*

SUMMARY OF ARGUMENT

Applying its idiosyncratic rule governing the admissibility of third-party guilt evidence, the South Carolina Supreme Court held that Bobby Lee Holmes was barred from offering evidence at trial that another man had committed and confessed to the crimes for which Holmes was tried, convicted, and sentenced to death. The exclusion of this evidence, which the trial court found to be sufficient for a jury to credit, violated Holmes' constitutional right to present a complete defense to a jury. This right has several mutually reinforcing components.

First, it encompasses the right to have a jury find the facts of guilt or innocence by evaluating the credibility of witnesses, weighing the evidence, and resolving conflicting inferences that may be drawn from that evidence. It also imposes a corresponding burden on the prosecution to prove to the jury the facts that demonstrate guilt beyond a reasonable doubt. The South Carolina Supreme Court's standard

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[8] In the course of summarily denying Holmes' other grounds for appeal, the Court also declined to address the constitutionality of the State's emphasis in its closing argument on the absence of third-party guilt evidence. App. 367-68.

for the admissibility of third-party guilt evidence transfers the jury's fact-finding function to a judge, who is tasked with comparing the defendant's third-party guilt evidence against the prosecution's entire case, and is instructed to exclude that evidence, unless, after assessing the credibility of witnesses and weighing the conflicting evidence and inferences, he decides that the third-party guilt evidence "overcomes" the prosecution's whole body of evidence and establishes a "reasonable inference" of innocence. Compounding this constitutional infirmity, if the prosecution's evidence, and especially its forensic evidence, is "strong," then third-party guilt evidence automatically cannot overcome the prosecution's evidence. Applying that standard here, the South Carolina Supreme Court, based on a cold record, concluded that in its eyes, Holmes' evidence of third-party guilt was not sufficient to overcome the State's case. In addition to appropriating the jury's fact-finding role, the South Carolina Supreme Court relieved the prosecution of its constitutional burden of proving to the jury guilt beyond a reasonable doubt by insisting that, as a preliminary matter in front of judges, the defendant demonstrate that his third-party guilt evidence overcomes the prosecution's case.

Second, the right to present a complete defense to the jury encompasses the right to compel the attendance of defense witnesses at trial. For decades now, this Court has admonished that the latitude of states to fashion rules of evidence must be balanced against the right of defendants to call witnesses in their defense. In *Chambers v. Mississippi*, 410 U.S. 284 (1973), the Court struck the balance in favor of the defendant and held that a state could not mechanistically apply its hearsay rules to prohibit the introduction of third-party guilt evidence, including evidence that another man had confessed to the crime for which the defendant had been charged. That balance tips heavily toward Holmes in this case. The impact of excluding third-party guilt evidence was more drastic here than it was in *Chambers*. The defendant in *Chambers* was at least

able to present some evidence pointing to another culprit. Holmes, by contrast, was prohibited from presenting any such evidence and thus lost the crux of his defense. Furthermore, the rationale for excluding the third-party guilt evidence in *Chambers* – ensuring the reliability of testimony – rested on firmer footing than South Carolina's justification for excluding the third-party guilt evidence here. The South Carolina Supreme Court did not ground its strict and apparently unprecedented rule governing the admissibility of third-party guilt evidence on the need to ensure reliability. In fact, the Court left undisturbed the trial judge's determination that Holmes' evidence of third-party guilt that Holmes sought to introduce was sufficiently reliable that a jury could find that another man had been at the right place at the right time to commit the crimes for which Holmes was charged, and then had confessed to committing those crimes no less than four times.

Third, the right to present a complete defense to the jury encompasses the right of the defendant to confront the government's witnesses at trial and to cross-examine them before the jury. This Court has long recognized that how a witness fares in the crucible of cross-examination greatly affects the jury's assessment of the witness' credibility and facilitates the exercise of the jury's function to weigh competing evidence and find the facts supporting guilt or innocence. Here, Holmes was deprived of a meaningful opportunity to cross-examine the State's witnesses, in particular the police officers who testified against Holmes at trial, about the evidence of third-party guilt that pointed to a different culprit. Such cross-examination could have magnified the holes in the State's purported forensic case against Holmes and supported Holmes' theory that his prosecution amounted to a rush to judgment by law enforcement authorities who decided to pin the crime on him from day one of the investigation.

ARGUMENT

This Court repeatedly has held that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotation omitted). This right, which the Court has described as among the most fundamental to our system of ordered liberty, *see, e.g., Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), has several components. It includes the right to have an impartial jury serve as the trier of all facts necessary for conviction, with the prosecution bearing the burden of proving to the jury guilt beyond a reasonable doubt. *E.g., Apprendi v. New Jersey*, 530 U.S. 466, 477-78 (2000); *In re Winship*, 397 U.S. 358, 364 (1970). It includes a right to compel the attendance of witnesses at trial and to present those witnesses in defense of the charges brought. *E.g., Rock v. Arkansas*, 483 U.S. 44, 61-62 (1987); *Crane*, 476 U.S. at 691; *Washington v. Texas*, 388 U.S. 14, 22 (1967). And it includes a right to subject the prosecution's case to "the crucible of meaningful adversarial testing" by confronting and cross-examining the prosecution's witnesses at trial. *Crane*, 476 U.S. at 690-91. Together, these constitutional guarantees reflect the "conviction . . . that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined" by the trier of fact. *Washington*, 388 U.S. at 22. Each of these guarantees was violated by the South Carolina Supreme Court's decision affirming the exclusion of Holmes' evidence that another person, Jimmy White, actually committed the crimes for which Holmes was tried, convicted, and sentenced to death.

A. The Exclusion of Third-Party Guilt Evidence Violated Holmes' Right to Trial by Jury

1. South Carolina's Standard for the Admissibility of Third-Party Guilt Evidence Unconstitutionally Diminishes the Jury's Role to Find Facts and Assess the Credibility of Witnesses in Criminal Cases by Transferring That Function to Judges

Three incontrovertible propositions make clear that South Carolina's approach to the admissibility of third-party guilt evidence cannot survive constitutional scrutiny. First, the Constitution guarantees every criminal defendant a trial by jury. Second, if a trial by jury means anything, it must mean that the jury serves as the trier of fact with exclusive responsibility for assessing credibility and weighing evidence. Third, the South Carolina Supreme Court's approach to admitting third-party guilt evidence transfers this inalienable jury function to the trial or appellate court by requiring that, to be admitted, a defendant's proffered third-party guilt evidence must "overcome" the prosecution's evidence of guilt to the point of creating a "reasonable inference" of innocence. App. 365.

Almost forty years ago, this Court held that the Due Process Clause of the Fourteenth Amendment guarantees a trial by jury in all criminal cases because this right, guaranteed in all federal cases by the Sixth Amendment, "is fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). As the Court recognized then, and has reaffirmed many times since, the Constitution's Framers believed that the common-sense judgment of a jury was "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.* at 156. This belief was no mere abstraction. The Framers had bitter experience with the transfer of power from local juries to judges appointed by the Crown as an instrument of monarchical

oppression and, for this reason, the right to trial by jury was "one of the least controversial" aspects of the original Bill of Rights. *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring); Akhil Reed Amar, *America's Constitution: A Biography* 329-32 (2005).

It is beyond dispute that this constitutionally guaranteed right to a jury trial contemplated that the jury would serve as the exclusive trier of fact in criminal matters. The very essence of trial by jury, as Blackstone described it, was the requirement that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors. . . ." 4 Blackstone, *Commentaries* *343 (emphasis added); *see also* 2 Joseph Story, *Commentaries on the Constitution of the United States* 540-41 (4th ed. 1873); *United States v. Gaudin*, 515 U.S. 506, 510-11 (1995). An essential element of the jury's responsibility for assessing the truth of every accusation is "[d]etermining the weight and credibility of witness testimony . . . [which] has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.'" *United States v. Scheffer*, 523 U.S. 303, 313 (1998) (quoting *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891)). Decisions of this Court recognizing this premise are legion. *E.g., United States v. Bailey*, 444 U.S. 394, 414-15 (1980); *Pierce v. United States*, 252 U.S. 239, 251-52 (1920); *Hoke v. United States*, 227 U.S. 308, 324 (1913). As the Court recently summarized the point, "[t]here is not one shred of doubt . . . about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury." *Blakely v. Washington*, 542 U.S. 296, 313 (2004). That division, as Lord Coke succinctly put it, is simply this: "Judges do not answer questions of fact; juries do not answer questions of law." 1 Sir

Edward Coke, *The First Part of the Institutes of the Laws of England*, Lib. 2, Cap. 12 § 234 at 155(b) (Hargave and Butler, 16th ed. 1809) (translated from the Latin: "*Ad questionem facti non respondent judices . . . ad questionem juris non respondent juratores.*").

The entire structure of the American criminal process is tailored to safeguarding this "fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 306. At the outset of every prosecution, the indictment must set forth all the facts and elements necessary for conviction on the offense charged, including those that bear exclusively on sentencing, so that the jury may determine whether the prosecution has proven each of these facts and elements beyond a reasonable doubt. *Apprendi*, 530 U.S. at 478 (citations omitted); *Blakely*, 542 U.S. at 309 (upholding "the jury's traditional function of finding the facts essential to lawful imposition of the penalty"). Moreover, at the close of evidence in a criminal case, the judge has no power to direct a verdict against the defendant. When a criminal charge is tried, the "question whether the effect of the evidence was such as to overcome any reasonable doubt of guilt [is] for the jury, not the court, to decide." *Pierce*, 252 U.S. at 251-52; *see also Jackson v. Denno*, 378 U.S. 368, 386 n.13 (1964) ("[T]rial courts do not direct a verdict against the defendant on issues of credibility.").[9]

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[9] *Crane* illustrates the application of this vital distinction to the exclusion of exculpatory evidence. There, the State introduced the defendant's confession as the cornerstone of its case and then opposed the defendant's effort to discredit his confession by introducing testimony about the physical and psychological environment in which the confession was obtained. *Crane*, 476 U.S. at 684-86. According to the State, this evidence was inadmissible because the court's pretrial ruling that the confession was sufficiently "voluntary" to be introduced into evidence precluded the defendant from trying to undermine its force by presenting testimony that the confession had been obtained under

(Continued on following page)

The jurisprudence regarding the Seventh Amendment right to jury trial in the civil context powerfully reinforces this strict demarcation between the responsibility of judges to decide legal questions and the responsibility of juries to assess credibility, weigh evidence, and thereby find facts. *See Poller v. CBS, Inc.*, 368 U.S. 464, 467 (1962) (authority of courts to grant summary judgment under Rule 56 is cabined so as "not to cut litigants off from their right of trial by jury if they really have issues to try"); Fed. R. Civ. P. 50 advisory committee's note (1991 amendment) (limitations on use of Rule 50(a) "make[] clear that action taken under the rule is a performance of the court's duty to assure enforcement of controlling law and is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment . . . ."). In constraining the power of judges to withdraw civil cases from juries through summary judgment, the Court has stressed that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Likewise, "in considering a motion for a directed verdict, the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party." *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554 (1990). Meticulously observing the distinct roles of judges and juries in civil matters, the Court has admonished that the weighing of evidence is a quintessential jury function that judges cannot appropriate under

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coercive conditions. *Id.* at 686. The state court excluded the defendant's proffered evidence on this ground, but this Court reversed. *Id.* at 686-87. It held unequivocally that, regardless of the trial court's determination that the confession met the legal standard for voluntariness, under the Sixth and Fourteenth Amendments, the "probative weight" of all otherwise admissible evidence bearing on the credibility of the confession was "a matter that is exclusively for the jury to assess." *Id.* at 688.

either Rule 56 or Rule 50. *See Anderson*, 477 U.S. at 255 ("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.").

The South Carolina Supreme Court's decision in this case mocks these principles. Under the guise of establishing a standard for admitting third-party guilt evidence, it usurps the jury's exclusive prerogative as the trier of fact to assess credibility and weigh evidence and arrogates this power to the court itself. According to the decision below, a defendant seeking to introduce third-party guilt evidence must sufficiently "overcome" the prosecution's evidence to raise a "reasonable inference" in the eyes of the trial judge as to the defendant's own innocence. In the absence of such a comparative showing, even if the third-party guilt evidence is relevant, competent, and otherwise admissible, the defendant will be prohibited – as Holmes was – from presenting it to the jury.

Applying this rule to the case at hand, the South Carolina Supreme Court specifically determined that because, in its view, the prosecution had "strong" forensic evidence, Holmes could not make the requisite showing even to allow his third-party guilt evidence to reach the jury. App. 364-65. In reaching this conclusion, the court engaged in an explicit weighing of the prosecution's evidence – including the forensic evidence, the evidence that Holmes matched Ms. Stewart's description of her assailant, and the evidence that he was on the victim's block at the time of the attack.[10] *Id.* The court also explicitly evaluated Holmes'

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[10] Here, as elsewhere, the court also misstated the record. Holmes did not fit the physical description and, unlike White, was not shown to be in close proximity to the victim's residence. App. 141-44, 149, 159-60, 179, 206-09, 327-28.

attempts to discredit the prosecution's forensic case through competing expert testimony. App. 365 & n.8. Implicit in the court's assessment were a myriad of credibility determinations regarding the competing witnesses who testified about the integrity of the police evidence collection and the results of the forensic testing, as well as an outright rejection of Holmes' proffered circumstantial and third-party guilt evidence that the police planted the blood evidence that yielded the forensic results the state court considered so damning. The impropriety of this approach is heightened by the fact that it was done by an appellate court operating solely from the cold trial transcript and without the benefit of observing the live witness testimony whose weight and credibility it was purporting to assess.

A more complete invasion of the jury's exclusive province, including its responsibility to serve as the "lie detector" for witness testimony, *Scheffer*, 523 U.S. at 313, is difficult to conceive. In effect, the decision below creates a two-trial system for criminal defendants seeking to introduce third-party guilt evidence. In the first trial, the defendant must convince a court that his third-party guilt evidence is not only competent, material, and relevant, but that standing alone, when weighed against the prosecution's evidence, it is sufficiently strong to "overcome" the prosecution's case and raise a "reasonable inference" of innocence. In the second trial – the one before the jury – the defendant gets to present his complete defense only if he wins the initial trial before the judge.

To be sure, states have considerable latitude in fashioning and applying evidentiary rules "designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Scheffer*, 523 U.S. at 330 n.17 (Stevens, J., dissenting) (quoting *Chambers*, 410 U.S. at 302). Third-party guilt evidence, like every type of evidence, is also subject to the demands of relevance, materiality, and

undue prejudice. *See Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (applying these constraints to admissibility questions generally). But in fashioning rules of evidence, no jurisdiction of which we are aware has a rule calling for a judge to evaluate the admissibility of evidence, not by assessing the proffered evidence in its own right,[11] but by weighing it against the strength of the other side's case, including drawing the inferences and making the credibility determinations necessary to conduct this analysis.[12]

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[11] To take but one example from the Federal Rules of Evidence, in playing the "gatekeeper role" of screening expert testimony offered by one party to ensure that it is reliable, *see Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993), judges do not weigh the reliability of that testimony against competing expert testimony offered by the other party. Rather, the expert's reliability is evaluated on its own terms, and will be admissible for the jury's consideration if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702. A judicial ruling based on an application of these standards that an expert's testimony is reliable in no way compels a ruling that contrary expert testimony offered by the other party is unreliable. *Id.* advisory committee's note (2000 amendments). The reliability of that party's expert testimony similarly will be evaluated on its own terms under the Rule 702 standards. And if the judge concludes that this testimony rests on "good grounds, based on what is known," *Daubert*, 509 U.S. at 590 (internal quotes omitted), it too is admitted for the jury's consideration where it will be "tested by the adversary process – competing expert testimony and active cross-examination – rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies." *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co.*, 161 F.3d 77, 85 (1st Cir. 1988).

[12] The South Carolina Supreme Court's decision also presents trial judges with a practical nightmare. At a pretrial hearing on third-party guilt evidence, how is a trial court supposed to assess the credibility of prosecution witnesses it has not yet heard or weigh evidence not yet admitted? Is the prosecution really expected to preview its whole case for the defendant, and vice-versa? Certainly, such a procedure bears no

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Whatever the scope of state authority to devise rules of evidence to ensure reliability and protect against undue prejudice, it cannot extend to substituting judicial determinations of witness credibility and the relative strength of prosecution and defense evidence for those of the jury. To hold otherwise would be to give judges in a select class of cases the practical ability to predetermine guilt based on their own assessment of the evidence and to render the right to jury trial a sham affair in which only the government's relevant and competent evidence is heard. In *Apprendi* and *Blakely*, this Court held that government may not remove from the jury and give to judges the power to answer any factual question essential to punishment. *Blakely*, 542 U.S. at 308; *Apprendi*, 530 U.S. at 478. Surely, by the same token, government may not give to judges the power to remove from the jury access to the relevant and competent evidence necessary to carry out its inviolable fact-finding function. Both actions embrace precisely the proposition rejected by the Framers "that facts are better discovered by judicial inquisition than by adversarial testing," *Blakely*, 542 U.S. at 313. And both create precisely the problem that the constitutional right to a trial by jury was meant to preclude – that the State would take the power to determine guilt in criminal trials away from the people themselves and give it to judges.

This case demonstrates the pernicious effect of South Carolina's rule. Here, the trial court – in findings that

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similarity to the typical hearing on *in limine* motions, which assess the admissibility of challenged evidence in its own right, not in counterpoint to the other side's entire case. As this Court recognized in *Richardson v. Marsh*, 481 U.S. 200 (1987), the whole notion of such a pretrial show-and-tell is deeply problematic. Nor is it feasible for a trial judge to delay ruling on third-party guilt evidence until a defendant seeks to have it admitted. Such a procedure would subject defendants to the peculiar disadvantage of potentially losing the use of their entire defense strategy after the prosecution has already put on its case.

stand uncontradicted – specifically concluded that Holmes' third-party guilt evidence was sufficient for a jury to find that White confessed multiple times to the crime; that he was near the site of the crime near the time of the crime; that he generally fit the victim's description of her attacker; that he gave a false alibi; that he had some propensity for older women like the victim; and that he was a violent person. App. 134-35. This evidence, including four mutually corroborating third-party confessions, supported each aspect of Holmes' defense, namely that the forensic evidence was tainted, inconclusive, or planted, and that Holmes' prosecution was the product of a rush to judgment by police officers angered by their previous run-in with him. Like the improperly withheld third-party guilt evidence that compelled this Court to order a new trial in *Kyles v. Whitley*, 514 U.S. 419 (1995), the third-party guilt evidence here "would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well." *Id.* at 445. Indeed, it can hardly be doubted that, had South Carolina put White on trial for the Stewart assault instead of Holmes, the third-party guilt evidence Holmes amassed, especially White's multiple confessions, would have been sufficient to sustain White's conviction for the crimes. Yet even though Holmes needed to do no more than raise a reasonable doubt as to his guilt, under the South Carolina Supreme Court's ruling, the jury heard not one iota of his third-party guilt evidence because, in light of the prosecution's purportedly "strong" forensic evidence, an appellate court deemed it per se inadmissible.

To be sure, courts commonly exclude evidence of third-party guilt when it shows only that another person had a motive to commit the crime or a mere propensity or opportunity to do so. Depending on circumstances, such evidence may not have sufficient probative value to be

deemed relevant or may have a marginal relevance that is outweighed by the potential for prejudice or jury confusion. *Johnson v. State*, 27 S.W.3d 405, 415 (Ark. 2000); *People v. Hall*, 718 P.2d 99, 104 (1986); *People v. Fort*, 618 N.E.2d 445, 455 (Ill. App. Ct. 1993). But no court, under ordinary rules of relevance and prejudice, could properly exclude Holmes' evidence that White confessed to the crime repeatedly and had both the opportunity and propensity to have attacked Ms. Stewart. As the trial court recognized, this evidence tended to show that White, not Holmes, committed the offenses charged. App. 134-35. The South Carolina Supreme Court could reach a contrary result only because it compared the weight of Holmes' third-party guilt evidence to that of the State's entire body of evidence, and drew its own conclusion as to the likelihood that Holmes was guilty.[13] Under the Sixth and Fourteenth Amendments, however, the assessment of guilt or innocence is a jury function. And for that reason, Holmes' conviction cannot stand.

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[13] Although not relevant to the legal issues raised here, the South Carolina Supreme Court's weighing of the evidence was badly misguided. In assessing the strength of the State's forensic case, for example, the court failed to consider the fact that Holmes' third-party guilt evidence directly supported his theory that either poor investigative and testing techniques had tainted the forensic results or that those results derived from blood evidence planted by the police. Also, to the extent the court intended to suggest that the forensic evidence tended to exculpate White, it erred. The fact that White's DNA did not appear on clothing samples that consisted mainly of Holmes' clothes has no probative value. Because White's clothes were never tested for Ms. Stewart's DNA and because the victim bathed immediately after the attack, the absence of DNA evidence linking White to the assault, in and of itself, neither inculpated nor exculpated White. App. 198-99, 356.

2. South Carolina's Standard for the Admissibility of Third-Party Guilt Evidence Reduces the Prosecution's Burden of Proving Guilt Beyond a Reasonable Doubt

The South Carolina Supreme Court's decision violated Holmes' right to a jury trial in a second related but independent fashion. Specifically, it unconstitutionally relieved the prosecution of its constitutionally imposed burden to prove guilt beyond a reasonable doubt by making the admissibility of defense evidence hinge on a defendant's ability to persuade a judge that the proffered evidence is sufficient to overcome the prosecution's case and raise a reasonable inference of innocence. *E.g.*, *Winship*, 397 U.S. at 364; *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). Under South Carolina law, it is not enough for a defendant to show that his evidence is genuinely probative of third-party guilt (as opposed to conjectural) or even that the evidence, if credited, is sufficient when considered together with other defense evidence to raise a reasonable doubt regarding his guilt. Instead, South Carolina law requires that a defendant show that the third-party guilt evidence, standing alone, "tend[s] clearly" to establish third-party guilt and further, "overcome[s]" the State's evidence to the point of raising a "reasonable interference" of innocence. Pet. App. at 11a-12a. Worse still, when the State presents what a court deems to be "strong forensic evidence" of guilt, South Carolina flatly prohibits the defendant from introducing third-party guilt evidence because, in such circumstances, third-party guilt evidence automatically does not raise a reasonable presumption of innocence and "cannot overcome" the State's case. App. 365.

While South Carolina's third-party guilt rule does not explicitly alter the prosecution's burden to prove guilt beyond a reasonable doubt, it lets the State meet that burden after forcing the defense to clear a preliminary hurdle – insurmountable in cases with strong inculpatory

forensic evidence – of overcoming the prosecution's evidence in order to get its own competent and relevant exculpatory evidence before the jury. The Constitution rejects such stacking of the evidentiary deck. In *Cool v. United States*, 409 U.S. 100 (1972) (per curiam), for example, this Court, invoking the Due Process Clause, declared unconstitutional a jury instruction that told the jury, in effect, "to ignore defense [accomplice] testimony unless it believes beyond a reasonable doubt that the testimony is true." *Id.* at 100. As this Court held, preconditioning the jury's consideration of defense testimony on a finding of truth beyond a reasonable doubt, "create[d] an artificial barrier to the consideration of relevant defense testimony" and, thus, "reduced the level of proof necessary for the Government to carry its burden." *Id.* at 104. This principle applies with even greater force here, where the "preliminary burden" – the required judicial finding that the defendant's evidence "overcome[s]" the prosecution's – prevents the jury from even hearing the testimony at issue. Such an approach is simply incompatible with the reasonable doubt standard – "a prime instrument for reducing the risk of convictions resting on factual error." *Winship*, 397 U.S. at 363.

B. The Exclusion of Third-Party Guilt Evidence Violated Holmes' Constitutional Right to Call Witnesses in His Defense

"Few rights," this Court has held, "are more fundamental than that of an accused to present witnesses in his own defense." *Chambers*, 410 U.S. at 302 (citing *Webb v. Texas*, 409 U.S. 95 (1972); *Washington*, 388 U.S. at 19; *In re Oliver*, 333 U.S. 257 (1948)). As noted in *Crane*, 476 U.S. at 490, the Court sometimes has derived this right directly from the Fourteenth Amendment's Due Process Clause. *E.g.*, *Chambers*, 410 U.S. at 302. In other cases, the Court has located the right in the Sixth Amendment's Compulsory Process Clause. *E.g.*, *Washington*, 388 U.S. at 23. Regardless of the precise

source, this Court has carefully scrutinized state evidentiary rules curtailing a defendant's constitutional right to present a complete defense and has invalidated evidentiary bars to the admission of defense witness testimony. *E.g.*, *Rock*, 483 U.S. at 61 (overturning bar to admission of hypnotically refreshed testimony); *Crane*, 476 U.S. at 691 (overturning bar on introduction of evidence regarding the circumstances of a confession); *Washington*, 388 U.S. at 23 (overturning bar on testimony by accomplices or accessories).

Foundational to this line of cases is *Chambers v. Mississippi*, where the Court precluded the State from "mechanistically" applying its evidentiary rules to prohibit the defendant from introducing third-party guilt evidence very similar to the evidence at issue here. 410 U.S. at 302. *Chambers* compels reversal of the decision below.

Leon Chambers was charged with killing a Woodman, Mississippi policeman during a confrontation between a large crowd and law enforcement officers, who were trying to serve an arrest warrant on a local youth. *Id.* at 285-86. According to the prosecution, Chambers shot officer Aaron Liberty with a 22-caliber revolver during an exchange of gunfire in which Chambers also suffered a bullet wound. *Id.*

While Chambers awaited trial, another man who was in the crowd when Liberty was shot, Gable MacDonald, came forward with a sworn statement in which he confessed to the crime. *Id.* at 287. A month later, however, MacDonald repudiated the confession. *Id.* at 288. MacDonald claimed that a local minister had talked him into giving a false confession as part of a plan to exonerate Chambers and share in the proceeds from a lawsuit Chambers would bring against the town of Woodman. *Id.*

At trial, Chambers proclaimed his innocence and sought to defend himself both by undermining the State's eyewitness testimony that he fired at Liberty and by introducing evidence that MacDonald actually committed the crime. *Id.* at 289. This third-party guilt evidence

included MacDonald's repudiated confession, as well as the testimony of three friends of MacDonald who said that he had also confessed to them. *Id.*

In presenting this defense, Chambers was permitted to call MacDonald to the stand and to have his initial confession introduced into evidence and read to the jury. *Id.* at 291. The State then cross-examined MacDonald, eliciting his repudiation of the confession, his purported reasons for giving a false confession, and an alibi that he was drinking beer with a person named Berkley Turner when the shooting started. *Id.* at 291-92. In light of this testimony, Chambers requested that the trial court permit him to treat MacDonald as an adverse witness for the purpose of challenging MacDonald's repudiation and alibi. *Id.* at 291. The trial court, however, denied the request and precluded Chambers from challenging MacDonald's testimony on cross-examination. *Id.* According to the trial court, Mississippi's "voucher" rule barred Chambers from impeaching the testimony of one of his own witnesses. *Id.* at 294.

Chambers did succeed in potentially undermining MacDonald's story in other ways. Chambers called one witness who testified to seeing MacDonald shoot Liberty, another who refuted MacDonald's alibi, and a third who testified that MacDonald owned a 22-caliber revolver, the type of gun used to shoot Liberty. *Id.* at 293-94. But Chambers lost another important part of his defense when the trial court refused to admit the testimony of the three persons who claimed that MacDonald had confessed to them. The trial court found such testimony to be inadmissible hearsay because, in Mississippi, the hearsay exception for statements against interest was limited to statements against pecuniary interest and did not include statements against penal interest, such as MacDonald's alleged confessions. *Id.* at 292.

This Court reversed, holding that Chambers' constitutional right "to a fair opportunity to defend against the State's accusations" precluded the Mississippi courts from applying the State's voucher and hearsay rules to exclude the testimony at issue. *Id.* at 294. As especially relevant here, the Court concluded that even the venerated hearsay rule, developed to promote reliability in the truth-seeking process, must yield when the evidence to be excluded is "critical" to the defense and bears "assurances of trustworthiness." *Id.* at 302. "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.*

From *Chambers* it follows *a fortiori* that Holmes was denied his constitutional right to present a complete defense and, specifically, his "right to call witnesses in his own behalf." *Id.* at 294. Although by its own terms *Chambers* does not sweep broadly, *id.* at 302-03, it embodies the basic principle that courts must balance the significance of the evidence at issue to the accused's defense against the underlying justification for the state evidentiary rule that would bar its admission. *See* Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713 (1976). Under *Chambers*, moreover, that balance must be struck in favor of admitting "critical" defense evidence, in particular evidence that a third party has confessed to the crime, absent a significant countervailing justification. On both sides of this balance, the case for admitting Holmes' third-party guilt evidence is substantially stronger than it was in *Chambers* – and, accordingly, *Chambers'* holding, notwithstanding its narrow reach, controls here.

First, with respect to the importance of the evidence to Holmes' defense, while Holmes and Chambers were kept from introducing nearly identical third-party guilt evidence, the effect was more drastic in Holmes' case.

Despite the exclusion of some of his third-party guilt evidence, Chambers was able to introduce significant evidence implicating MacDonald, including MacDonald's own confession and testimony of another witness contradicting MacDonald's alibi. By contrast, the South Carolina court excluded Holmes' third-party guilt evidence in its entirety and thereby devastated Holmes' planned defense. That defense was based on a narrative that Jimmy White committed the Stewart crimes while the police single-mindedly followed a baseless predisposition to pin the crimes on Holmes. The proximity and confession evidence implicating White provided essential and compelling support for both aspects of this story. The testimony pointed the finger directly at White, while also casting doubt on the state's forensic case as the product of either the police's incompetent handling of the evidence or the planting of evidence in support of their initial hasty decision to pursue Holmes as the prime suspect. With the exclusion of the third-party guilt evidence, Holmes lost the glue holding his account together and was relegated to arguing flaws in the forensic evidence that the jury may well have perceived as a resort to technicalities.[14]

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[14] This Court has previously recognized the importance of presenting a jury with the kind of complete evidentiary story that Holmes lost when his third-party guilt evidence was excluded. As the Court observed in *Old Chief v. United States*, 519 U.S. 172, 188 (1997), there is "the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be," and juries "may well hold the absence of that evidence against the party" who fails to provide it. *Id.* at 188 n.9. Empirical analyses of jury decision-making are in accord. They show that jurors do not reason in a linear fashion – evaluating the weight of each piece of evidence individually and then entering that weight into the final calculus. *See* Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 511-13 (2004). Rather, they reason in a more holistic manner by ordering the information they hear into a narrative, or story. *See, e.g.*, John B. Mitchell, *Evaluating* Brady *Error Using Narrative Theory: A Proposal for Reform*, 53 DRAKE L. REV. 559 (2005);

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In sum, this Court's conclusion that the excluded confession and cross-examination evidence in *Chambers* was "critical" and that its absence rendered Chambers' defense "far less persuasive than it might have been" applies with even greater force here. Holmes did not (like Chambers) merely lose additional corroborating evidence for a third-party guilt strategy; he lost that strategy entirely, as well as the core of the rest of his defense.

On the other side of the *Chambers* balance, the State's justification for excluding the third-party guilt evidence, in particular the confession testimony, was stronger in *Chambers* than it is here. In *Chambers*, Mississippi courts excluded the confession evidence pursuant to Mississippi's policy determination that statements against penal interest are not sufficiently reliable to qualify as an exception to the hearsay rule. In overriding this policy judgment in the particular circumstance of Chambers' case, this Court recognized that Mississippi's distinction between statements against pecuniary interest and statements against penal interest, despite "considerable scholarly criticism, . . . might

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Peter Brooks, *Narrativity of the Law*, 14 LAW & LITERATURE 1 (2002); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681 (1994); Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 599 (1991). The prosecutor in this case clearly understood this point – and exploited it by emphasizing in closing argument Holmes' inability to provide a story with an alternative culprit. Ridiculing Holmes' claim that the police framed him, the prosecutor exclaimed: "[I]f you are going to frame them (*sic*) and it's going to be Bobby Holmes, where is this raping, murdering, beating fellow that did this thing?" App. 338. Holmes objected that the prosecutor's argument violated due process, but the state court ruled that Holmes waived the argument by waiting to object until the end of the prosecutor's close rather than interrupting contemporaneously. App. 366-67. In his Petition for Certiorari, Holmes argued that the prosecutor's closing argument violated the rule of fair rebuttal in *Simmons v. South Carolina*, 512 U.S. 154 (1994), and *Skipper v. South Carolina*, 476 U.S. 1 (1986). This Court denied certiorari on this issue.

serve some valid state purpose by excluding untrustworthy testimony." 410 U.S. at 300. Nonetheless, the Court held that because the Chambers' third-party confession evidence was critical to the defense and bore various indicia of trustworthiness, the Constitution compelled an exception to the State's generally applicable evidentiary rule in his case. *Id.* at 300-02.

South Carolina can provide no similarly valid justification for excluding Holmes' third-party guilt evidence. The decision below nowhere calls into question the trustworthiness of that evidence. To the contrary, the court left untouched the findings of the trial judge – who had observed the witnesses – that a jury could determine, based on Holmes' third-party guilt evidence, that Jimmy White was very close to Ms. Stewart's home at or about the time of the attack and that White confessed to at least four people that he committed the crimes. Nor did the South Carolina Supreme Court invoke any of the "familiar," generally applicable rules of evidence "designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Scheffer*, 523 U.S. at 330 n.17 (Stevens, J., dissenting) (quoting *Chambers*, 410 U.S. at 302).[15]

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[15] The trial court explained its decision to exclude Holmes' third-party confession evidence on grounds arguably related to reliability – namely, that the testimony of the confession witnesses did not fit within South Carolina Rule of Evidence ("SCRE") 804(b)(3), governing the hearsay exception for statements against interest because, purportedly, the contents of the statements were not sufficiently corroborated by other evidence. App. 135-37. Had the South Carolina Supreme Court adopted this ground for exclusion, it would have set up nearly an exact replay of *Chambers*. But it did not adopt this analysis. And with good reason. The trial court was demonstrably wrong in its hearsay ruling. First, SCRE 804(b)(3) does not apply to the confession evidence. It applies only when the declarant is unavailable. SCRE 804(b). The declarant here, White, was not only available (in the county jail), he testified at the pretrial hearing. App. 74-93. Second, even if SCRE 804(b)(3) were somehow deemed to apply, the trial court still erred.

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Instead, the South Carolina Supreme Court applied a special rule, applicable only to a defendant's third-party guilt evidence, to declare relevant, competent, and otherwise admissible evidence to be inadmissible solely because it is, purportedly, not strong enough to "overcome" the prosecution's case and raise a reasonable inference of innocence. Worse still, the court ruled that defendants simply cannot meet this standard when the prosecution presents "strong forensic evidence." Forensic evidence, though, which is basically opinion evidence, is not sacrosanct. Such evidence is vulnerable to what is known colloquially as the "garbarge in, garbage out" phenomena, meaning that its probative value depends on the integrity of the police collection techniques, the quality of the expert analysis, and, of course, whether the police planted the source material from which the forensic results were derived. As was true in this case, relevant third-party guilt evidence tends to raise doubts about the validity of inculpatory forensic results, however facially "strong" they might be. Accordingly, far from advancing the truth-seeking function, the effect of South Carolina's rule is to

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Contrary to the court's ruling, SCRE 804(b)(3) does not require clear corroboration of the *contents* of the statements at issue. It requires corroboration only for the fact that the statement at issue was actually made – a standard clearly met by the confession evidence here. *See State v. Kinloch*, 526 S.E.2d 705, 707 (S.C. 2000); *State v. Wannamaker*, 552 S.E.2d 284, 287 (S.C. 2001). Third, because White was available to testify, Holmes could have introduced the confession evidence under SCRE 801(d)(1)(A) as a prior inconsistent statement of White's. In this scenario, the hearsay rule would have been entirely inapplicable. In any event, the confession evidence Holmes sought to introduce bore many of the same indicia of reliability as the evidence this Court held to be reliable in *Chambers*. Each of Holmes' confession witnesses reinforced the reliability of the others. None of these witnesses had an apparent motive to lie. Their testimony was consistent with the evidence that White was close to Ms. Stewart's apartment near the time of the crime. And White's own availability further diminished any reliability concerns. *Compare Chambers*, 410 U.S. at 302.

privilege and even immunize forensic evidence, despite its fallibility, against legitimate attack.

No one disputes that trial judges have "wide latitude" to determine the relevance of evidence and to exclude evidence that is "'repetitive . . . , only marginally relevant,' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" *Crane*, 476 U.S. at 689-90 (quoting *Van Arsdall*, 475 U.S. at 679); *see*, *supra*, at 29-30. But whatever the exact scope of the latitude states may enjoy in applying these commonplace standards to the particulars of a defendant's third-party guilt evidence, that latitude cannot possibly extend to requiring, as a condition of admissibility, that competent and reliable third-party guilt evidence actually overcome the prosecution's evidence and establish a reasonable inference of innocence, or to creating a blanket rule of inadmissibility in cases where the prosecution has "strong" forensic evidence. Such a rule does nothing to advance the search for truth, which in our system is achieved not through judicial fiat at the evidentiary stage but through "the crucible of meaningful adversarial testing," *Crane*, 476 U.S. at 691, and serves no purpose except the invalid purpose of "improving the State's likelihood of winning a conviction against a certain type of defendant," *Montana v. Egelhoff*, 518 U.S. 37, 67 (1996) (O'Connor, J., dissenting). For just as the Constitution proscribes dispensing with the confrontation of witnesses because a judge has deemed certain evidence reliable, so too it proscribes excluding reliable evidence because a judge deems it insufficiently probative when measured against the state's case. Both are "akin to dispensing with jury trial because [in a judge's view] a defendant is obviously guilty." *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

Since *Chambers*, this Court has several times applied its principles to declare unconstitutional evidentiary bars that precluded defendants from introducing relevant and competent potentially exculpatory evidence. *Rock*, 483

U.S. at 61; *Crane*, 476 U.S. at 691. It has even done so, with respect to the testimony of percipient witnesses, when the basis for this testimony (hypnotic refreshment) created threshold reliability concerns not present here. *Rock*, 483 U.S. at 61. On a few occasions, the Court has upheld evidentiary bars in order to prevent defendants from subverting the integrity of the truth-seeking process through litigation gamesmanship[16] or pursuant to the familiar practice of excluding expert opinion testimony based on debatably reliable data.[17] But since *Washington v. Texas* made the Sixth Amendment applicable to the states, 388 U.S. at 19, this Court has never countenanced a state evidentiary rule excluding, as South Carolina has, relevant, competent, reliable, and timely proffered evidence from percipient witnesses who would testify directly to a defendant's innocence. The Court has also looked with particular disfavor on evidentiary rules, like South Carolina's, that "burden[] only the defense and not the prosecution." *Scheffer*, 523 U.S. at 316 n.12 (citing *Washington*, 388 U.S. at 22-23).

As a general matter, the Court has repeatedly emphasized that state rules inhibiting an accused's right to present a defense may not be "arbitrary" or "'disproportionate to the purposes they are designed to serve.'"

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[16] In *Taylor v. Illinois*, 484 U.S. 400 (1988), for example, the Court affirmed the exclusion of a defense witness after defense counsel failed to give timely notice to the prosecution. As the Court emphasized, this "severest sanction" was justified by the defendant's willful violation of the rule, the fact that the proffered testimony was likely perjurious, and because the rule itself served the vital purpose of protecting the "integrity of the adversary process" and its "truth-determining function." *Id.* at 414-17; *see also Michigan v. Lucas*, 500 U.S. 145 (1991) (permitting preclusion sanction for violation of rape shield law notice requirement in exceptional circumstances).

[17] *See Scheffer*, 523 U.S. at 308 (upholding exclusion of polygraph evidence based on policy judgment that such evidence is not sufficiently reliable).

Scheffer, 523 U.S. at 308 (quoting *Rock*, 483 U.S. at 56). South Carolina's third-party evidence rule flunks this test. As the facts of this case show, the rule arbitrarily excludes relevant, competent, and reliable evidence for no reason other than the facial strength of the prosecution's case and establishes a standard for admitting third-party guilt evidence that is grossly disproportionate to any conceivable concern about filtering out evidence that is tangential, repetitive, or likely to cause prejudice or confusion. The Constitution allows no such thing.

C. Barring Holmes from Cross-Examining the State's Witnesses About Third-Party Guilt Violated His Rights Under the Confrontation Clause of the Sixth Amendment

Not only was Holmes prevented from casting doubt on the prosecution's case against him by introducing evidence tying Jimmy White to the attack on Ms. Stewart, he also was barred from cross-examining the York police officers about why they discounted leads pointing to White and instead set their sights on Holmes as the culprit from day one. This powerful line of cross-examination could have further exposed the slipshod police investigation and magnified the holes in the State's forensic evidence. This yet additional ramification of South Carolina's rule on third-party guilt evidence violated Holmes' right of cross-examination under the Confrontation Clause of the Sixth Amendment, which guarantees the right of a criminal defendant "to be confronted with the witnesses against him." U.S. CONST. amend. VI. *See Crawford*, 541 U.S. at 47-49; *Coy v. Iowa*, 487 U.S. 1012, 1017-19 (1988).

This Court has many times held that the Constitution promises criminal defendants the right not merely to confront the government's witnesses in the physical sense, but also to subject those witnesses to cross-examination before the jury. *See Crawford*, 541 U.S. at 48-49 (noting

Framers' conception that confrontation of witnesses includes the right to cross-examine them in front of the jury); *Van Arsdall*, 475 U.S. at 678 ("'the main and essential purpose' of [the Confrontation Clause] is to secure for the [defendant] the opportunity of cross-examination" (citation omitted)); *see also United States v. Owens*, 484 U.S. 554, 557 (1988) ("[The Confrontation Clause] has long been read as securing an adequate opportunity to cross-examine adverse witnesses."). Indeed, the Court repeatedly has labeled the right of cross-examination an indispensable component of the overarching guarantee of a fair criminal trial. *See, e.g., Pointer v. Texas*, 380 U.S. 400, 405 (1965) ("There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.").

This emphasis on the central importance of the right to cross-examination reflects the vital role it plays in adducing the reliability of evidence and promoting the search for truth that a jury – not a judge – must conduct in criminal trials. *See Lee v. Illinois*, 476 U.S. 530, 540 (1986). As this Court observed in *California v. Green*, 399 U.S. 149 (1970), the Confrontation Clause both "forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth," and also "permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *Id.* at 158. Similarly in *Crawford*, this Court emphasized that, pursuant to the Confrontation Clause, the reliability of the government's witnesses against the defendant must be assessed by a jury (not a judge) "in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence . . . , but about how reliability can best be determined." *Crawford*, 541 U.S. at 61, 68.

Although most of this Court's Confrontation Clause cases have involved challenges to the government's use of out-of-court statements by witnesses who did not testify at trial and who thus were not cross-examined at all by the defendant, *see, e.g., id.* at 40, the Court also has addressed Confrontation Clause challenges to restrictions on the scope of cross-examination. *See, e.g., Olden v. Kentucky*, 488 U.S. 227, 232 (1988) (per curiam); *Van Arsdall*, 475 U.S. at 679-80; *Davis v. Alaska*, 415 U.S. 308, 317-18 (1974). In this line of cases, the Court has insisted that such restrictions should be narrowly focused and anchored in concerns about "harassment, prejudice, confusion of the issues, the witnesses' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, 475 U.S. at 679. The Court has been wary of restrictions that sweep more broadly and "effectively emasculate the right of cross-examination itself," *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985), and has repeatedly invalidated restrictions that denied the defendant a meaningful opportunity to conduct cross-examination.

In *Olden*, for example, the trial court barred a black defendant in a rape case from cross-examining the white complainant about her extramarital affair with another black man as a means of showing that the defendant's relationship with her also was consensual. 488 U.S. at 229-30. This Court summarily reversed, characterizing the restriction on cross-examination as "beyond reason," and stating that "[s]peculation as to the effect of the jurors' racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of [the complainant's] testimony." *Id.* at 232. Along the same lines, in *Van Arsdall* and *Davis*, the Court struck down limitations on cross-examination that effectively prevented the defendants from highlighting to the jury possible biases of key government witnesses. *Van Arsdall*, 475 U.S. at 679-80; *Davis*, 415 U.S. at 317-18. As the Court stressed in *Van Arsdall*, "[a] reasonable jury might have received a

significantly different impression of the [witness'] credibility had [the defendant] been permitted to pursue his proposed line of cross-examination." 475 U.S. at 680; *see Davis*, 415 U.S. at 318 (limitation on cross-examination rendered defendant "unable to make a record from which to argue why [the witness] might have been biased or otherwise lacked the degree of impartiality expected of a witness at trial").

Like the defendants in *Olden*, *Van Arsdall*, and *Davis*, Holmes' opportunity to conduct a meaningful cross-examination was significantly circumscribed. Under South Carolina's rule on third-party guilt evidence, Holmes was precluded altogether from questioning any of the State's witnesses about the evidence linking Jimmy White to the crime. Had Holmes been able to inquire about third-party guilt on cross-examination, he could have asked the testifying police officers whether they were aware that multiple witnesses had said that Jimmy White confessed to them that he had attacked Ms. Stewart. Holmes also could have asked the officers whether they were aware that multiple witnesses had seen White in the vicinity of Ms. Stewart's apartment on the morning of the attack. Additionally, Holmes could have asked the officers whether they were aware that White more closely matched Ms. Stewart's description of her attacker than did Holmes. And Holmes could have asked the officers whether they were aware that White had both a violent streak and an attraction to older women. If the officers had answered yes to these questions, then Holmes could have followed up by probing why the officers disregarded the litany of evidence pointing to White as the culprit. If the officers had answered no to the questions, then Holmes could have followed up by probing into the lack of depth and quality of the officers' investigation. Either way, the cross-examination on third-party guilt evidence could have had a devastating impact on the State's case against Holmes.

Like the cross-examination that was cut off in *Olden*, the cross-examination that Holmes was barred from conducting had the "strong potential to demonstrate the falsity" of the State's case. 488 U.S. at 232. In particular, it would have bolstered Holmes' arguments (which he was forced to make without the benefit of third-party guilt evidence) that the police investigation was extremely lax, and that his arrest and prosecution amounted to a rush to judgment by the State. And like the cross-examination that was cut off in *Van Arsdall* and *Davis*, the cross-examination that Holmes was barred from conducting could have furnished support for the notion that the government witnesses were biased against him. In particular, this cross-examination would have illuminated Holmes' argument that York police officers, especially James "Boot" Smith, harbored a grudge against Holmes (either historically or because of their encounter with Holmes in the early morning hours of the day of the attack on Ms. Stewart).[18]

All told, through cross-examination on the subject of third-party guilt evidence, Holmes may have been able to diminish the credibility of the government's witnesses in the minds of the jurors. But the jury never heard this avenue of cross-examination. Instead, applying South Carolina's rule on evidence of third-party guilt, the South Carolina Supreme Court arrogated to itself the jury's function of making credibility determinations and decided, based solely on a reading of the trial transcript, that evidence connecting Jimmy White to the Stewart attack did

[18] As it was, Holmes sought to show the officers' bias against him. But as was true of the defendants who were constrained in their efforts to demonstrate bias on cross-examination in *Van Arsdall* and *Davis*, Holmes was handicapped because he was precluded on cross-examination from making the most powerful case of bias – namely, that the officers turned a blind eye towards evidence linking White to the assault on Stewart and directed their focus entirely on Holmes.

not "overcome" the State's evidence against Holmes. A crucial line of inquiry on cross-examination, "the greatest legal engine ever invented for the discovery of truth," *Green*, 399 U.S. at 158, thus was unconstitutionally short-circuited.[19]

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below and order that a new trial be granted.

Respectfully submitted,

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[19] The trial court initially was inclined to permit Holmes to cross-examine the State's witnesses about third-party guilt evidence. App. 197-98. Shortly before Holmes presented his defense, however, the trial court abruptly changed its mind and barred this line of questioning. App. 200-02. There is no indication that the imposition of this restriction was based on concerns about "harassment, prejudice, confusion of the issues, the witnesses' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, 475 U.S. at 679. Moreover, the trial court itself had determined that the evidence of third-party guilt was sufficiently probative and credible as to raise a reasonable inference that Holmes was innocent. App. 134-35.

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In The
Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

vs.

STATE OF SOUTH CAROLINA ,

Respondent.

On Writ Of Certiorari
To The Supreme Court of South Carolina

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

In South Carolina, a criminal defendant's evidence of third-party guilt is inadmissible if, when comparing this evidence standing alone against the prosecution's evidence, the trial court finds that it fails to create a reasonable inference of innocence. In making this comparison, if the trial court finds the prosecution's evidence - and especially its forensic evidence - to be "strong", third-party guilt evidence is per se inadmissible because it is deemed, as a matter of law, to be insufficient to "overcome" the prosecution's evidence so as to create a reasonable inference of innocence.

1. Whether South Carolina's rule governing the admissibility of third-party guilt evidence violates a criminal defendant's constitutional right to present a complete defense grounded in the Due Process, Confrontation, and Compulsory Process Clauses?

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STATEMENT OF THE CASE

A. The Assault, Rapes, and Burglary of Mary Stewart.

After fleeing from the police,[1] between 6:00-6:30 a.m., Holmes went to 224 California Street, the home of Ms. Mary

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[1] **Holmes Fight and Flight to Mary Stewart's Home.**

On December 31, 1989, there was a fight at the Cannon Court apartment complex in York, South Carolina, approximately one mile from Mary Stewart's home and Holmes's father's home. J.A. 163-164. See State Exhibit 31. The confrontation involved Bobby Holmes and Bobby Hemphill. J.A. 175. Officer Grady Harper of the York Police Department received a call at 4:43 a.m., to respond to the disturbance, and he arrived there at 4:45 a.m. Upon his arrival, a number of people, including Holmes, were making a disturbance. Officer Harper told them to quiet down and move on. J.A. 165-166. Holmes was unruly and Officer Harper called for back-up to assist in the arrest. J.A. 166. 172-173.

By this time, Officers Richard McCarter and Otis Driggers also responding to the 4:43 a.m. call had arrived on the scene. Because Holmes refused to leave the scene, the officers moved to arrest him for disturbing the peace. J.A. 166-167. He ran from them, behind the apartments, and then he jumped over a 5½ - 6- foot tall brick wall. Officer Harper saw Holmes get into the car of Terrance Digsby, where he laid down in the back seat. J.A. 169, 177-178. Officer Harper, who had left Cannon Court, saw Holmes and followed Mr. Digsby's car down Ross Cannon Street and right onto First Street where Mr. Digsby turned left into a yard.

When the car stopped Holmes got out and ran behind a church. J.A. 170-171, 174. Officer Harper proceeded to place a call to Officers McCarter and Driggers who spotted Holmes in front of the church at about 5:15 a.m. He ran in front of their patrol car, through a yard, then into some weeds and a ditch. Officers McCarter and Driggers pursued Holmes until he disappeared after going into a ditch. He was last seen in the chase about 5:20 a.m. J.A.175. He was wearing a black hooded sweater and blue jeans. ROA 2423. Evidence revealed that he was within 870 feet of Stewart's home by his own statements.

Stewart, an 86-year-old retired school teacher.[2] Holmes opened the unlocked screen door and began knocking on the inside door. When Ms. Stewart reached the door, he burst into the house and began to beat her in the head while asking for her money. Ms. Stewart told him that her money was in her purse. Holmes searched the purse and found $40 that Ms. Stewart's friend, Mrs. Alaine Byers, had brought Ms. Stewart in cashed checks. Wanting more money, Holmes continued to beat Ms. Stewart until they reached the bedroom. Fearing Ms. Stewart had seen his face, Holmes tried to rape Ms. Stewart vaginally. Because he was physically too big to do this successfully, he raped Ms. Stewart anally, spreading blood o er the clothes and sheets. He then left, after ripping the living room telephone off the wall.

B. The Discovery of Ms. Stewart.

At 7:45 a.m. that same morning, Mrs. Maggie Thrasher called Ms. Stewart to check on her, but did not get an answer after six (6) or seven (7) rings. ROA 2147-48. Shortly thereafter, Ms. Stewart called back and told Mrs. Thrasher, in a shaky voice, about the circumstances that she had been beaten and raped. J.A. 141, ROA p. 2148-49. She told Ms. Thrasher that someone had knocked on her door and when she opened it, he pushed right in and asked for money. When she told him she did not have money he began to beat her and rape her. She said he first tried to get in her front but he was too big and he then went into her rectum. He left when she said she'd clean herself up. ROA p. 2149. Thrasher

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[2] Later that day, Officer Edwards talked to several of the victim's neighbors. Ms. Boyd told him she heard knocking at her door about 3 a.m.; Mr. Lynn, who lived next door to the victim, reported knocking between 5:30 a.m. and 6:30 a.m.; Ms. Diggs, who lived on the other side of the victim, heard someone knocking on her door around 6 or 6:30 a.m., and Ms. Sparks who heard someone knocking at her door at daylight. None of these witnesses were able to give a description since they had not answered the door. ROA 2212-2214.

stated that the victim described the assailant as "a dark chunky fellow" and "kind of short, dark skinned fellow, chunky wide." 142. The victim stated to her that he took $40.00. J.A. 141.

Mrs. Thrasher proceeded to call Mrs. Byers, who had a key to Ms. Stewart's house. J.A. 142. Mrs. Byers rushed over to Ms. Stewart's house where she found a messy house and Ms. Stewart in the bedroom. J.A. 143. When asked who did this to her, Ms. Stewart told Byers that "I don't know who it he was. All I know is he was big and dark." J.A. 144. The victim then told Byers that the perpetrator tried to use her vagina and he couldn't and he used her rectum. ROA p. 2167. Mrs. Byers went to call the police, but the phone was off the wall so she went to the police department. ROA p. 2167-68. The police then sent help immediately.[3]

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[3]**The Treatment of Ms. Stewart**

While the three police officers were there, two paramedics arrived to transport the victim to a local hospital emergency room. Mrs. Linda Lowman, an EMT with the York Rescue Squad, arrived along with her husband at Ms. Stewart's house. ROA p. 2221. Ms. Stewart was in her bedroom complaining about pain in her hips. ROA p. 2222. Mrs. Lowman and her husband carried Ms. Stewart out to the ambulance. ROA p. 2223. Ms. Stewart's vital signs were taken and her pulse and blood pressure were higher than normal. ROA p. 2224-25. Ms. Stewart was taken to the hospital. Her primary impression was "multi-trauma shock."

Ms. Stewart was received at 9:00 a.m. on December 31, 1989 at Divine Savior Hospital by Mrs. Carol Cole, an emergency room nurse. ROA p. 2230-31. Ms. Stewart had bruises on her face and was complaining of pain in her hips and head. ROA p. 2235. Nurse Cole's notes reflected similar summary of the incident included "the number of assailants was one. Late twenties. Black. He was a stranger." J.A. 149. Nurse Cole and Dr. Todd Gwinn began following and using a rape protocol kit when they examined Ms. Stewart. ROA p. 2233, 2258-60. The exam was stopped when the pelvic exam began because Ms. Stewart complained about the pain in her hips and they wanted to make sure nothing was broken before they attempted it. J.A.145, 149-150. ROA p. 2236, 2260-61. The rape protocol

Officer Dale Edwards of the York Police Department was the first to arrive on the scene. Officer Wilson Barnett arrived soon thereafter. J.A. 157. ROA p. 2179-82. They asked Ms. Stewart what happened and she told them that she had answered the door, a black male forced his way in, pushed her back into the bedroom, tore her nightgown off and attempted to rape her vaginally, then began to have anal sex, while beating her head.

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kit was given to law enforcement officials. ROA p. 2239. When Dr. Gwinn checked on Ms. Stewart at 11:00 a.m., she had become confused and her speech was garbled. J.A 153-54 Dr. Gwinn felt that Ms. Stewart needed an emergency CT scan to check for bleeding on the brain, so he transferred her immediately to Piedmont Medical Center. J.A. 154; ROA p. 2262.

When Ms. Stewart arrived at noon at Piedmont Medical Center, she was confused and she could not control her bladder or bowels. She had an incontinent stool which caused rectal bleeding. Her blood pressure went down and she became diaphoretic. Ms. Stewart's condition continued to deteriorate to the point where a tube was put in to breathe for her. A catheter was put in to drain her bladder. She was put on a helicopter at 3:00 p.m. to be taken to Carolinas Medical Center. By this time, Ms. Stewart was not coherent.

Dr. John Macey at Charlotte Memorial Hospital (now called Carolina Medical Center) in Charlotte performed a complete rape trauma kit after she arrived on December 31. J.A. 154. ROA p. 2281-84. She was unable to respond at that time. ROA p. 2282-83. The kit was handed over to Scott Johnson of the York City Police. J.A. 155.

Ms. Stewart was treated for her head trauma, but her condition continued to deteriorate. After no improvement, she was discharged in a vegetative condition with a feeding tube to Meadow Haven Nursing Home on February 16, 1990. ROA p. 3123-25. Ms. Stewart died of pneumonia at Meadow Haven Nursing Home on March 10, 1990. ROA 3600-01. See J.A. 248-249.

J.A. 144. She said he then took $40.00 from her pocketbook and left. She then went and took a shower. J.A. 144-145.[4]

Officer Edwards removed the sheets and pillowcase from the bed for use as evidence, and placed the items in a paper grocery bag taken from the victim's kitchen. ROA 2183 - 2187. Lt. Barnett arrived and assisted in the evidence collection. A pink nightgown, a housecoat, and a rag were removed from the bathroom and placed in another grocery bag. JA 147-148. The victim gave Officer Edwards a pink paper towel with blood on it. JA 146. He placed the paper towel in a separate manila envelope brought to the scene by Captain Mobley, the third officer on the scene. JA 148. ROA p. 2184-2190, 2203. Captain Mobley collected the nightgown, robe, and napkin, as well as the sheets from Ms. Stewart's bed and her purse. Captain Mobley also dusted for fingerprints and he found a latent palm print on the inside of the front door and a latent fingerprint on the outside of the front door.

D. Bobby Holmes Arrest and the Processing of the Scene.

Captain Mobley testified that after Officer Edwards and Lt. Barnett left the victim's apartment, he locked the front door

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[4]Officer Barnett would later complete a taped interview with the victim after she was transported to Divine Savior Hospital for treatment that date. J.A. 157. State Exhibit 9. She described the perpetrator as "The hair was kind of long, not too long, but a little longer than you usually wear it" and that "he was middle aged, he was young. He was not too young. And he , as I remember, his hair was not short or not too long." J.A. 159-160. She stated that the hair was longer than Officer Barnett's was at the time. ROA 2352. She also told Barnett that he had on a "dark jacket, must have been blue or black, must have been black because you see, I don't see too well, you know, without my glasses. J.A. 161. She also stated that he had on "a pair of funny looking pants . . . not the old pant, but something that's kind of mixed up you know." ROA 2348. She also described her attacker as "dark skinned", "not too heavy, not too slim" "real dark." ROA 2356.

and began processing the scene. J.A. 180-181. He stated that Edwards had advised him that they had already seized taken the bed linen, a nightgown and a paper towel. ROA 2481. Mobley received these items from him which had already been bagged. Id. In processing the scene, he seized a second paper towel located in the trash can in the bathroom. ROA 2483. State Exhibit 13. He sealed the towel at that time with evidence tape in a paper bag. ROA 2484. He also seized the telephone touched by the assailant and the victim's purse. He then dusted the apartment for fingerprints. J.A. 181. On the interior side of the front door, he photographed and then lifted a latent partial palm print located slightly above the doorknob. J.A. 182. (The inside palm print was later identified as that of Holmes by Agent Derrick of the State Law Enforcement Division. J.A. 211-215). Captain Mobley also photographed and then lifted an identifiable print from the outside of the front door. J.A. 182-183. (Agent Derrick was unable to match the outside door print with anyone. J.A. 210). Captain Mobley also found several smudges in the kitchen area, but they did not have sufficient ridge detail for identification. J.A. 182. He was unable to develop any identifiable prints from either the telephone or the pocketbook. J.A. 183, ROA 2494-95.

After processing Ms. Stewart's house on December 31, 1989, Captain Mobley expanded his investigation and Holmes became a suspect. J.A. 183. Mobley had become aware that a person wearing similar clothes to Holmes that morning was seen in the California Street area. Holmes had also been suspected of grand larceny of two (2) vehicles and warrants were issued for the Holmes's arrest on the two (2) counts of grand larceny. Captain Mobley affirmed the signing of the warrants around 2:00 p.m. and went to Holmes' father's residence. J.A. 184-185. Mr. Willie Holmes, his father, answered the door and said he did not think Holmes was home. Then, a noise came from the bedroom. ROA 2498-99. Officer James "Boot" Smith, who was with Captain Mobley, walked to the bedroom and knocked on the door identifying himself as a police officer. Holmes opened the door

wearing a black hooded sweat jacket and a pair of white briefs. Holmes was arrested for grand larceny. He put on a pair of light colored Bugle Boy jeans, a University of South Carolina baseball cap, and some Nike tennis shoes. A blue and white tank top that appeared to have blood on it was collected,[5] as well as another black sweat shirt from the washing machine, and a pair of white sweat socks. J.A. 185-186.

Holmes was taken to the York Police Department where he was booked. His clothes and wallet were taken. Holmes was outfitted in an orange jumpsuit and shower shoes. J.A. 187- 188. In Holmes wallet were a total of forty-four ($44) dollars consisting of two ten dollar bills, four five dollar bills and four one dollar bills. J.A. 188, 192. Holmes was advised of his Miranda rights, but he waived them and gave an oral statement to Bruce Bryant of SLED concerning his travels after the fight. J.A. 188, See ROA 2825-2827.. He was subsequently taken to Divine Savior Hospital to give hair and blood samples. J.A 189.[6]

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[5]Holmes advised them that the blood came from a fight the night before at Clyde's Bar . J.A. 186.

[6]**THE FORENSIC EVIDENCE**

Mrs. Nancy Greene, a forensic serologist for SLED, in 1990 matched the blood type from the nightgown and on of the paper towels (SLED 9) with blood from Ms. Stewart as being ABO Group O. ROA 3179 - 3182. The human blood found on the other paper towel (SLED 16), Petitioner's briefs, jeans, and blue and white striped tank top was initially unidentifiable under 1990 techniques. J.A. 235-236, ROA 3179-3183. Subsequently, Greene sent cuttings from the white paper towel (State Exhibit 48), cutting the jeans (State Exhibit 49), the tank top (State Exhibit 50), pink nightgown (State Exhibit 51), underpants (State Exhibit 52) and other paper towel (#19.2) to the SLED DNA Lab, with the blood vials from the rape kits and suspect kits. ROA 3186-87. She acknowledged that from her testing, there was no evidence of semen or spermatozoa present. J.A. 236.

Mr. John Barron, a trace evidence scientist for SLED, found four

THE PRE-TRIAL HEARING ON THIRD PARTY GUILT.

Holmes contended that the trial court erred in refusing to admit third party guilt evidence in the guilt phase related to Jimmy McCaw White. The proffer was initially presented at pre-trial hearings. J.A. 4-138, ROA. p. 5822-6458. The trial judge denied the motion to admit such evidence by written order. J.A. 133-138. A request to reconsider the order was denied by the trial court. J.A. 139-141. ROA 3634- 36, 3638-3656, 3709. The court later denied the presentation of the evidence in the penalty phase. ROA 4404-05. The trial court

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matches of fibers connecting Holmes with the crime scene. He found black cotton polyester fibers consistent with Holmes black sweat jacket on the bed sheets from Ms. Stewart's bed. Mr. Barron also found a blue acrylic fiber consistent with the jeans from the victim's pink nightgown. J.A. 227. He also found modacrylic fibers recovered from the pink nightgown that matched a brown modacrylic fiber ball recovered from Holmes underwear briefs. ROA p. 2997.

SLED Crime Scene Analyst Steve Derrick determined that the partial print from the inside door was consistent with Holmes's palm print. J.A. 211.

In the DNA testing done by F.B.I. Forensic Examiner Frank Baechtel, he determined that the stain on the white paper towel (Q1) matched the victim's DNA. He also determined that the stain on Holmes' underpants revealed a mixture of DNA from a male and a female; and that comparing their profiles, Holmes and the victim were possible contributors in the mixed stain to the probability of one in seventy-two million and excluding 99.99999% of the population. J.A. 244-245. The Petitioner's DNA was also found to be consistent with items recovered at the crime scene mixed with the victim's DNA. ROA p. 3526-30. Similarly, Holmes and the victim's were also the possible contributors to the DNA found on the blue and white striped shirt (Q3) and the other paper towel found at the scene (Q6). J.A. 246. Also, J.A. 236-237.

did not abuse his discretion in denying the admission of this evidence.

1. The "Holmes Did Not Do The Crime" Witnesses.[7]

Thomas Murray testified that he had heard Jimmy White in 1992 state that Holmes was in jail for nothing and that they could not bring him back for trial. He said that he heard

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[7] *The Proximity Witnesses Gilmore, Jamison, Brown and Boyd*

Taking their testimony in the light most favorable to the defense, three of these witnesses only put Jimmy White in the California Street/Pecan Circle area between 3:30 am and 5:30 am on the morning of December 31, 1989.

Meshelly Gilmore testified that she saw Jimmy White between 3:30 am and 4:30 am in the Pecan Circle apartment parking lot near Mrs. Stewart's home and was still there when she returned at 4:30-4:45 a.m. J.A. 9-14. Frenetta Jamison saw him on the hill on California Street between 4:30 am and "something to five" am after she was returning from approximately 7½ hours of drinking at Clyde's. J.A. 5-9. Deloris Brown looks briefly out of her apartment window onto California Street between 4:00 am and 5:00 am and sees an individual she identifies as Jimmy White solely by the way he walked. J.A. 95-98. Eighty-seven year old Annie Boyd, who lived in the same apartment complex as the victim testified that someone knocked on her door after she went to bed and said "open the door my man, this is Jimmy." J.A. 30. Boyd did not open the door and did not recognize the voice. She said she could not tell what time of night is was, but that it was dark. J.A. 31.

None of the witnesses were able to identify the clothing of the individual. J.A. 9, 30, Although this testimony is certainly suspect for the variety of reasons previously enumerated, even if completely credible as the trial court in its Order recognized, it does little more than place Jimmy White in the general area at some time prior to the crime. Such evidence is not inconsistent with Holmes' guilt in that none of this testimony precludes Holmes from actually being in Mrs. Stewart's home committing the assault while Jimmy White was merely in the neighborhood. Therefore, such evidence falls far short of raising a reasonable inference or presumption of Holmes' own innocence and would fall more closely into the area of conjecture of fanciful analogy.

that Homes was supposed to be on the other side of town involved in another fight. J.A. 105- 107. Murray clarified that he had never heard White admit to him that he did the crime that Holmes was accused of committing. J.A. 108-109. He also denied ever stating what was in his earlier affidavit that knowledge of White committing the crime was widespread and puts him [White] in trouble with other Rock Hill inmates. J.A. 109. Murray denied other portions of his affidavit. He denied ever stating item 4 in the affidavit concerning White framing Holmes for a dispute in with him York, because he did not know anything about it. J.A. 109-110. He also stated that he had spoken with Solicitor Pope's office that and told them that no woman had ever notarized his signature on a statement. J.A.111. Contrary to the assertion in Petitioner's brief, Murray stated that White was just saying that he knew Bobby was innocent, but he never said he did it. Id. ROA 6409.

Nancy Bennett, a secretary with the York County Public Defender's Office testified that in 1992, a client, Jimmy White came into the office for an appointment. While there, he inquired as to when the Bobby Holmes case was going to be tried. He stated to her that he didn't think that Bobby was guilty and that he knew maybe who did it and that everybody on the street knew. J.A. 37. He did not tell her who did it. Id.

John Dixon described a conversation he had with White, Thomas Murray and Thomas Walker at the Prison Farm while they were serving time. J.A. 100. He stated that Murray asked White, that " being that Bobby already got the time for it, why don't you go ahead and 'fess up to it" and that White responded "what's done is already done." J.A. 101-103. Dixon denied that White ever stated that he did it. ROA 6193-64.

2. The "Admissions of Guilt by White" Witnesses.

Mattie Mae Scott, Thomas Murray's mother, testified that in October 1997 she was at her other son James's house when Jimmy and others came to visit. Jimmy was "partially intoxicated," and when the others began talking about the 'old lady in York' that Jimmy had raped and murdered, Jimmy said, "Yes, I did it but [Holmes] is going to fry for it." J.A. 113-115. She described White as "light-skinned with a silver tooth in his mouth. ROA 6421.

Ken Rhodes testified he asked Jimmy whether the word on the street, that Jimmy was the victim's murderer, was true and that Jimmy "put his head down and he raised his head back up and he said well, you know, I like older women .... and he never called the lady's name but you know he say that he liked old women and that yeah he did what they say he did and you know that somebody else was locked up for it. And you know it's like he didn't have no regrets about it at all." Rhodes went on to testify that "[Jimmy] didn't say exactly what he done, he just told me that she had some good stuff ... He said that he didn't kill the lady. The lady was alive when he left...." J.A. 120-121. However, Ken Rhodes admitted being good friends with Bobby Holmes since the mid-eighties. J.A. 124-125. ROA 6429. He stated that he used to ride with Holmes. J.A. 126. He stated that he had also met his mother and father. J.A. 126. He stated the only person he had told was his wife. J.A. 129. At some point, he received a call from Holmes lawyers. Id. However, there was never any testimony that involved this particular crime, only that White ran with older women. J.A. 132.

Stephen Westbrook, another inmate, was the apparent star witness and attempted to develop admissions and conspiracies. He testified that in 1990 and again in 1994 Jimmy told him he had broken into the victim's house and raped her. Jimmy told Westbrook that deceased Officer Boot Smith had told Jimmy White to keep quiet about his guilt. J.A. 41-43.

Westbrook further testified that Officer Smith and Investigator Potts came to see Westbrook before Holmes's first trial and offered to get him out of jail if he would testify that Holmes had confessed to him. J.A. 43-44. Westbrook testified that in June 2000, about two months before this pretrial hearing, he was brought to Rock Hill from Kirkland Correctional Institute. He claimed that in Rock Hill, he was confronted by several employees of the solicitor's office who sought to convince him to testify against Holmes in the upcoming second trial. J.A. 45-46. Westbrook stated that the solicitor's office employees acknowledged to him that they had manufactured underwear evidence incriminating Holmes. J.A. 50. Westbrook also testified that Jimmy told him that Officer Smith was out to "frame" Holmes, and that even Holmes's former attorney had urged him to testify against Holmes. J.A. 44, 62-63. Finally, Westbrook testified an employee of the solicitor's office stated that, in addition to the manufactured underwear evidence, they had lifted one of Holmes's palm prints from the county jail door to use against him at trial. J.A. 50, 362.

On cross-examination, it was developed that prior statements he had given contained numerous inaccuracies and were not true in parts. J.A. 54-61, 64-65. In fact, Westbrook even asserted at one point that he just signed the statement and had not read it. J.A. 62-63, 65. It was developed that although he stated he knew Holmes "from around" that his family connections were so close that Holmes had put Westbrook's brother on his visitor list. J.A. 52, 54-55, 61-63. He acknowledged that in his statement and testimony he referred to different times. J.A. 63-64, 74. Some of the circumstances he described were physically impossible since White was not in custody at the stated time. J.A. 64-65.

4. Jimmy McCall White's Denials.

Jimmy McCall White testified at the pre-trial hearing. J.A. 74-93. In the prior statement he had given on April 2, 1980, White stated that he had gone with Junior Lytle and Michael Burkin to Clyde's about 10 p.m. He stated he left there at 1:30 a.m. on December 31, 1989 and arrived home at 2 a.m. In the statement, he said he got up that morning and went to Lytle's house and learned about some woman who was raped in York. J.A. 82-83. He denied the crime of either a rape or beating. 83. In his testimony. White stated that he had learned from Junior's father that he was denying that he gave White his ride home. White continued to assert that he left at around one. J.A. 86. He denied that he had made the statements to Westbrook, and Dixon. He denied going to the Public Defenders office or making that comment. J.A 89-90.[8]

5. The Exclusion of White In DNA Testing.

During the trial, the State proffered the testimony of a F. B. I. Agent Baechtel. After testing Jimmy White's specimen, i.e. a dried bloodstain, and comparing the specimen to the clothing items that were tested as part of the investigation, he determined that White was excluded as a contributor. J.A. 237-238.

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[8]The Petitioner contends that White incriminated himself with a false alibi by contending that he road with Joshua Lytle that morning to his home in Sharon. Although Lytle denied that White was in the car with him that night or morning and initially denied seeing White at any of Lytle's drinking stops, ROA 5946 - 47, later he conceded seeing White and that he had given a statement on April 7, 1990 that admitted seeing White at Clyde's that night, but "I drank a few beers, I can't remember much about tha. weekend." J.A. 19, 25. Nonetheless, taking the defense's view that Jimmy White lied about his alibi, this still has no other effect than to cast a bare suspicion on Jimmy White and even that is extremely tenuous. Again, as the trial court recognized this testimony does little more than support the proximity argument. J.A. 134.

The Trial Court's Rulings Denying Admission of the Proffer.

After the state had concluded its guilt phase case in chief, the trial judge again held that he was going to disallow the testimony holding that it could not come in under SCRE Rule 803 (b)(3) and Rule 801(d)(1)(a). ROA 3655. Relying upon State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999) and State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941) the court held that the statement lacked trustworthiness because there was no evidence that tends to clearly point out that Mr. White was guilty of the crime. J.A. 249-263, ROA 3655-56.

In his earlier written order after the pre-trial hearing on August 23, 2000, the trial court noted that although he had presented some testimony that White was in the proximity of Mary Stewart's apartment at a time when the victim was beaten, the alleged statements of White, the engine that "drives the train" under the Gregory standard, fell short of the indicia of trustworthiness lacking any details and where no forensic evidence links White to the crime.

The trial court found that there was no independent corroborating evidence of Jimmy White's alleged statements that he committed the beating and rape of Mary Stewart as required under the state supreme court's requirements in State v. Kinloch, 338 S.C. 385, 526 S.E.2d 705 (2000) interpreting South Carolina Rules of Evidence (SCRE), Rule 804(b)(3). Additionally, the court found at the time of the alleged statement made in the presence of Mattie Mae Scott, Jimmy White was, according to her, "intoxicated." The court found that none of the proffered testimony contains evidence, absent the statement itself, which would link White to the crime, other than information that from all the testimony appeared to have been common knowledge in the community, i.e. that an "old woman" had been beaten and raped in the early morning hours

and that Holmes had been tried, convicted and sentenced to death for the crime.[9] Thus, the indicia of reliability was not met. Under Kinloch, the court found that the statements of White were not admissible. J.A. 136-137.

The trial court then held that the exclusion of the alleged statements of Jimmy McCaw White, would leave not only the engine missing from the train, but resulted in there being absolutely no facts or circumstances which clearly point to Mr. White or anyone else as the person guilty of the beating and rape of Mary Stewart. Relying on Gregory, the motion to present evidence of third party guilt was denied. Judge Hayes deferred any issue as to impeachment until the trial. J.A. 133-138.

The South Carolina Supreme Court's Holding.

The South Carolina Supreme Court initially rejected the petitioner's claim concerning the admission of substantive third party guilt evidence and held that the proffer set out in State v. Gregory , 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) and State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001).[10] These standards required that admissible third party guilt evidence is limited to such facts that are inconsistent with the defendant's guilt and to such facts which raise a reasonable inference or

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[9]It found that none of White's statements contain any details of the crime and that no forensic evidence was offered linking White to the crime. White's alleged statements were general in nature and his presence in the general area during the time period in which the crime is alleged to have occurred, does not corroborate his alleged "confessions.

[10] The Holmes Court also cited the holding in State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001), that where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence.

presumption to his own innocence and more than conjecture or suspicion. In addition, there must be such proof of connection with it, such as a train of facts or circumstances , as clearly points out such other person as the guilty party. J.A. 364. Further, the court held that where there is strong forensic evidence of a defendant's guilt, the proffered evidence about a third party's guilt does not raise the necessary reasonable inference as to innocence to require the admission. Id. The appellate found concluded that the proffer was properly denied due to the strong forensic evidence of guilt pointing exclusively to Holmes. [11] The court summarily rejected appellate issue IV involving the disallowance of impeachment of certain police officers about the adequacy of their investigation about third party guilt, citing "State v. Johnson, 525 S.E.2d 519 (S.C.), *cert. denied,* 531 U.S. 840 (2000) (appellate court will not disturb trial court's ruling concerning scope of cross-examination of a witness to test his or her credibility absent manifest abuse of discretion); see also State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (trial court erred by not

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[11] The court found that the strong evidence included: (1) Holmes's palm print was found just above the door knob on the interior side of the front door of the victim's house; (2) fibers consistent with a black sweatshirt owned by Holmes found on the victim's bed sheets; (3) matching blue fibers were found on the victim's pink nightgown and on Holmes's blue jeans; (4) microscopically consistent fibers were found on the pink nightgown and on Holmes's underwear; (5) appellant's underwear contained a mixture of DNA from two individuals, and 99.99% of the population other than appellant and the victim were excluded as contributors to that mixture; and (6) appellant's tank top was found to contain a mixture of appellant's blood and the victim's blood. The appellate court also concluded that other than the forensic evidence, there was evidence that Holmes matched the description of the perpetrator given by the victim and there was evidence that Holmes was fleeing from police officers and was in the area of the victim's house prior to the time she was attacked. The court also noted that White was excluded by the DNA testing done from being a contributor to any evidence connected to the scene.

admitting impeachment evidence after officer denied he had investigated two suspects different from the defendant; however, error found to be harmless)." J.A. 366-367.

SUMMARY OF THE ARGUMENT

This appeal must be dismissed as being improvidently granted where none of the federal constitutional claims were presented to the South Carolina Supreme Court. The Petitioner failed to raise the issues in the statement of the issues or in the initial brief before the court. The petitioner's conclusory sentences were insufficient as a matter of state procedure to preserve the issue for appellate review. The failure of the appellate court to cite to any federal constitutional claim in disposing of the issue and relying upon state evidentiary law alone reveals that the constitutional claims were not presented or addressed by the court. This procedural defect precludes jurisdiction in this court.

Where evidence of proffered third party guilt does not raise a reasonable inference of guilt toward the third party, due process is not denied by the exclusion of the evidence. The right to present evidence is not unlimited, but subject to reasonable restrictions. South Carolina's standards the admission of third party guilt evidence comports with similar practices in state and federal courts. Requiring the trial judge to make the determination on admissibility does not deprive a defendant of the right to a jury trial when he is unable to satisfy the reasonable inference showing tested against the entire circumstances of the case. Similarly, the rejection of unreliable evidence does not dilute the state's burden of proof beyond a reasonable doubt. South Carolina's rejection of the particular evidence in this case was consistent with the requirements of due process and the state evidentiary standards.

Even if the evidence should have been introduced, based upon a review if the entire record, the alleged deficiency is harmless beyond a reasonable doubt. The record before this court contains overwhelming evidence uniquely pointing to Holmes as the perpetrator to the exclusion of all others. The combination of the forensic evidence which excludes the third party and the evidence, direct and circumstantial, involving Holmes, conclusively suggest that the exclusion did not contribute to the verdict so as to require a new trial.

ARGUMENT

I. This Appeal Should Be Dismissed As Improvidently Granted Because Petitioner's Federal Claims Were Not Adequately Presented To The South Carolina Supreme Court.

It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." Webb v. Webb, 451 U.S. 493, 496-497 (1981). "[I]t is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth." New York Central R. Co. v. New York, 186 U.S. 269, 273 (1902). "[P]assing invocations of 'due process' " that "fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment" do not "meet our minimal requirement that it must be clear that a federal claim was presented." Adams v. Robertson, 520 U.S. 83, 89, n. 3 (1997) (per curiam).

Former Chief Justice Rehnquist, in writing a dissent in Chambers, opined that the constitutional claims raised at that time on third party guilt had not been properly presented in the Mississippi court under its procedural rules. Chambers, supra.,

410 U.S., at 308-314 (dissenting opinion of Rehnquist, J.). Recognizing the limitations imposed by Congress upon the Court's authority to review judgments of state courts as a jurisdictional limitation, he recognized that the constitutional claim must be brought to the attention of the state court "with fair precision and in due time", citing Street v. New York, 394 U.S. 576, 584, n.3 (1969). He reiterated that "even the most lenient construction of 28 U.S.C. § 1257 that requires that the title, right privilege or immunity' be 'specially set up or claimed' could not aid petitioner that this point properly raised a federal constitutional issue." Id., 410 U.S. at 313.

It is extraordinarily doubtful that the South Carolina appellate court would ignore its own procedures and expand its consideration to unarticulated federal constitutional claims which were never specifically presented to in the briefing before that court when the Petitioner was arguing his issues in reliance on state evidentiary law and standards. Simply put, there is no showing that Holmes ever raised these particular constitutional claims related to the exclusion of evidence in the guilt phase of his trial in his direct appeal to the South Carolina Supreme Court. This Court lacks subject matter jurisdiction to consider this particular challenge to the guilt phase presentation and certiorari must be dismissed as improvidently granted.

The Petitioner asserts, for the first time before this Court, that the state trial court's application of the evidentiary standard of State v. Gregory, 198 S.C. 98, 165 S.E.2d 532 (1941) during the guilt phase of his trial violates the constitutional mandates in Chambers v. Mississippi, 410 U.S. 284 (1973) because it allegedly creates a *per se* exclusion of third party guilt evidence where the prosecution case is "strong." This federal constitutional challenge to the existing state evidentiary test was never raised in *any* challenge to the guilt phase evidence before the Supreme Court of South Carolina. In fact, Chambers v. Mississippi, 410 U.S. 284

(1973) was *never* cited in the Final Brief of Appellant on the guilt phase issues where they relied solely on reference to state evidentiary law and rules to support the admission. See *Final Brief of Appellant*, pp. 7-30, *Final Reply Brief of Appellant*, pp. 5-19.[12] To the contrary, Holmes claimed that the standard set out in State v. Gregory was the appropriate test for the court to consider the admission of this evidence. *Final Brief of Appellant, pp. 9, 18, 30. Final Reply Brief of Appellant*, p. 10. Also, Holmes cited the earlier decision of State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001) in support of his position on admissibility. *Final Brief of Appellant*, pp. 17, 19; *Final Reply Brief of Appellant*, pp. 9. Conclusively, in the petition for rehearing before the Supreme Court of South Carolina, Holmes again stated that the evidence was admissible under "the Gregory and Gay standard." *Petition for Rehearing*, p. 2. Unlike his presentation in this Court, no particular reference was made to any federal constitutional violation concerning the *Gregory-Gay* standard in the appellate pleadings challenging the exclusion of the guilt phase evidence in the appeal.

Since the Petitioner contended that the Gregory - Gay analysis was the appropriate guilt phase evidentiary standard in the state court, he has not preserved his right to challenge the use of these standards in this Court. As revealed in the *Final Brief of Appellant*, the guilt phase evidentiary issues raised were solely based upon state evidentiary law and its applicability to the various offers of third party guilt evidence suggested by Holmes.

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[12] The only guilt phase citation to any non-South Carolina evidentiary cases was a passing reference to Chambers in a footnote in the *Final Reply Brief of Appellant, p. 10, n. 11*. However, in that setting, Chambers was cited as support for the corroboration requirement of SCRE Rule 804(b)(3), not as a federal constitutional challenge to the state evidentiary standard.

The Court has stated many times that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary." R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 175 (8th ed. 2002), citing Street v. New York, 394 U.S. 576, 582(1969); Chicago, I. & L.R. Co. V. McGuire, 196 U.S. 128, 131-33 (1905).

The constitutional claims sought to be asserted in this proceeding were never properly presented to the South Carolina Supreme Court for its consideration under its state appellate rules and procedures in the "statement of issues" within the brief or the brief itself. Because of these deficiencies, these claims were never ruled upon by the South Carolina Supreme Court. Rule 208(b)(1)(B), SCACR, requires an appellant's initial brief to contain "[a] statement of each of the issues presented for review." "[O]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal." In the Statement of Issues On Appeal in the Final Brief of Appellant, Holmes made only general statements without any specification to the federal constitution. Chief Justice Toal and her co-authors write in their work *Appellate Practice in South Carolina* that "where an issue is not specifically set out in the statement of issues, the appellate court may nevertheless consider the issue if it is reasonably clear from appellant's arguments." Toal, et al. *Appellate Practice In South Carolina* 75 (2d ed.2002). Sullivan Co., Inc. v. New Swirl, Inc., 313 S.C. 34, 437 S.E.2d 30. (S.C. 1993).

In South Carolina, for issue preservation, assuming the "statement of the issue" is sufficient, the issue must also be argued fully in the initial brief of appellant to be preserved for the Court's consideration. State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999) (brief conclusory statement

inadequate to preserve issue); First Savings Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal).

Holmes' belated attempt in his *Final Reply Brief* in the state appellate court to incorporate the penalty phase constitutional claims in the initial brief did not preserve those issues as a matter of state law for either the South Carolina Supreme Court or ultimately this Court. First, he ignores his own statement in state court that "evidence introduced during the penalty phase of a criminal trial is not held to the same evidentiary standards utilized at the guilt-or-innocence phase." *Final Brief of Appellant*, p. 38. Second, this attempted incorporation was inadequate as a matter of state appellate procedure, to preserve for appellate consideration specific federal constitutional not identified in the initial brief (or statement of the issues). See, Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct.App.1993) (holding that failure to provide argument or supporting authority for an issue renders it abandoned).

In the authoritative work on appellate practice in South Carolina authored by Chief Justice Jean Toal, it states that an appellant may not use the reply brief to argue issues not argued in the initial brief. Toal et al., *Appellate Practice in South Carolina* 75-76 (2d. ed. 2002). Caselaw supports this proposition of state appellate practice. Bochette v. Bochette, 300 S.C. 109, 386 S.E.2d 475 (Ct.App.1989); Glasscock, Inc. v. United States Fidelity and Guar. Co. , 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001)(An argument in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief). Therefore, the passing reference to Chambers in that brief was also inadequate.

The conclusory references to the Constitution in the final sentence of each argument in the Final Brief of Appellant is insufficient to preserve jurisdiction for certiorari in this Court. See, *State v. Holmes, Final Brief of Appellant*, pp. 19, 22, 26, 30. Mere conclusory reference to the constitution cannot be deemed adequate to create jurisdiction in this Court. See, Herndon v. Georgia, 285 U.S. 441, 442-43 (1935); Bowe v. Scott, 233 U.S. 658, 664-65 (1914) ("due process of law" insufficient); Howell v. Mississippi, 543 U.S. 440 (2005) (per curiam) (petitioner's federal constitutional claim was not properly raised before the state court because "he did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases"). 28 U.S.C. Section 1257 requires that federal law challenges to state law decisions be "addressed by or properly presented" to the state court before the Supreme Court may hear the case. Id. at 860. In Beck v. Washington, 369 U.S. 541, 553 (1962), the Court found the waiver of a constitutional claim that was merely mentioned in one sentence in the 125 page brief in the state court.

The similar failure to meet these minimum standards by Holmes in the South Carolina Supreme Court bars consideration of his federal constitutional question presented here.[13] First, as acknowledged by the Petitioner in his merit brief at page 20, the South Carolina Supreme Court in its opinion "analyzed the matter solely as an issue of state law" and never addressed any federal constitutional claim or analysis in disposing and rejecting the state law evidentiary issue. Second, none of the required "statement of the issues" referenced the federal constitution, any amendment, or the

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[13] The Respondent acknowledges that Holmes did make reference to Chambers in his presentation on the failure to admit the evidence in the penalty phase. *Final Brief of Respondents, pp. 38-43.* However, a review of the petition before this Court reveals the current issue is solely on the guilt phase evidence issue, not the penalty phase.

constitutional right to a jury, right to present a defense, or constitutional right to confront his accusers. Third, the initial (and final) brief of appellant never articulated the basis of any particular constitutional violation implicated in the exclusion of the evidence related to Jimmy White in the guilt phase and only attacked its exclusion under a state evidentiary law analysis. Fourth, Holmes never contended in any state appellate court briefing that the Gregory - Gay standard concerning the admission of third party guilt evidence was a violation the federal constitution generally, or specifically the right to a jury trial and the right to confront his accusers. To the contrary, Holmes relied on both cases in his brief before the Court to assert the exclusion of the evidence was in error as a matter of state evidentiary law. Fifth, the passing reference to Chambers in the reply brief was not sufficient to preserve the issue. Finally, Holmes' petition for rehearing, similarly did not invoke any particularized constitutional claim concerning the exclusion of the evidence. See, *Petition for Rehearing*, November 15, 2004. See Radio Station WOW v. Johnson, 326 U.S. 120, 128 (1945).

Given Holmes failure to ever suggest to the state appellate court the Gregory-Gay test for the admission of the evidence violates either the right to a jury trial, the right to present a defense, or reduce the prosecutions burden of proof, it is no surprise that the state court considered the claim solely as a matter of state law. Jurisdiction within this Court under 28 U.S.C. Section 1257 is lacking.

II. The South Carolina Supreme Court's Application Of Its State Evidentiary Standard In Denying The Admission of Third Party Guilt Evidence Concerning Jimmy McCaw White Was Appropriate Where The Evidence Did Not Rise To The Level of Trustworthiness Necessary To Establish Its Admissibility Since The Proffered Evidence Did Not

Raise A Reasonable Inference or Presumption As To His Own Innocence.

A. The right to present relevant evidence in his defense is not unlimited, but subject to reasonable restrictions.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " Crane v. Kentucky, 476 U.S. 683, 690 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)).A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. See Taylor v. Illinois, 484 U.S. 400, 410 (1988); Rock v. Arkansas, 483 U.S. 44, 55 (1987); Chambers v. Mississippi, 410 U.S. 284, 295 (1973). A defendant's interest in presenting such evidence may thus " 'bow to accommodate other legitimate interests in the criminal trial process.' " Rock, supra, at 55 (quoting Chambers, supra, at 295); accord, Michigan v. Lucas, 500 U.S. 145, 149 (1991). However, that right is not unlimited. "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " United States v. Scheffer, 523 U.S. 303, 308 (1998) (quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987)) (emphasis added). "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, [evidentiary rules] may not be applied mechanistically to defeat the ends of justice." Chambers, 410 U.S. at 302. The Supreme Court has "found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty

interest of the accused." Scheffer, 523 U.S. at 308. See Rock, supra, at 58; Chambers, supra, at 302; Washington v. Texas, 388 U.S. 14, 22-23 (1967).

In Chambers v. Mississippi, 410 U.S. 284 (1973), the Court was confronted with a defendant's inability to introduce evidence that a third person had repeatedly confessed orally to committing the murder with which the defendant was charged. When Chambers was tried, the Mississippi Rules of Evidence did not recognize an exception to the hearsay rule for declarations against penal interest and adhered to the common law "voucher rule." The Supreme Court held that the exclusion of the evidence constituted a violation of the Due Process Clause of the Fourteenth Amendment. In Chambers, the Court explicitly noted that the third party's confessions "were originally made and subsequently offered at trial under circumstances that provided considerable assurances of their reliability." *Id.* at 300. The third party confessed to three different individuals. The confessions were made spontaneously and to close acquaintances shortly after the murder occurred. The confessions were corroborated by substantial independent evidence. The declarant did not stand to benefit from disclosing his role in the murder, and the declarant was present in the courtroom and could have been cross-examined under oath. *Id.* at 300-01.

The Court briefly noted that a rationale for the rule against hearsay is to exclude untrustworthy testimony. *Id.* at 298. Where the testimony bears persuasive assurances of trustworthiness and the testimony is exculpatory in nature, the hearsay rule should "not be applied mechanistically to defeat the ends of justice." *Id.* at 302. Accordingly, Chambers effectively held that stringent application of the rule against hearsay may violate fundamental standards of due process when the rule is applied mechanistically and in a manner precluding introduction of statements against penal interest that

are both reliable and "directly affecting the ascertainment of guilt." *Id.*

The crux of Chambers is that a defendant has a fundamental right to present *reliable* evidence of a third party's confession to a crime for which the defendant is being tried. Evidence of a spontaneous confession by a third party that is corroborated by direct evidence satisfies a showing of "particularized guarantees of trustworthiness" and is sufficiently reliable to be admissible as an exception to the rule against hearsay. It is error therefore to apply rules of exclusion without regard to the particular circumstances of the case or reliability of the evidence, and without regard to the trial court's discretion.

Chambers is but one of several Supreme Court decisions dealing with state rules of evidence used to reject a defendant's evidence on "mechanistic" grounds. In Green v. Georgia, 442 U.S. 95 (1979), the Court again reversed a conviction where the Georgia courts had rejected hearsay statements on the ground that Georgia did not recognize the penal interest exception to the hearsay rule. An earlier case, Washington v. Texas, 388 U.S. 14 (1967), involved Texas statutes which prohibited persons charged or convicted as co-participants in a crime from testifying for each other, though they could testify for the State. Washington's proffer of testimony tended to show that Washington was not the shooter. The evidence was rejected pursuant to the Texas statutes. The Supreme Court reversed the conviction on the grounds that the State's rule "arbitrarily" deprived Washington of his right under the Sixth Amendment to present witnesses in his defense. In Rock v. Arkansas, 483 U.S. 44 (1987), the Court held that a state could not "arbitrarily or disproportionately" prevent a defendant from testifying in her defense by implementing a per se rule prohibiting hypnotically enhanced testimony.

These cases, taken together, stand for the proposition that states may not impede a defendant's right to put on a defense by imposing mechanistic (Chambers) or arbitrary (Washington and Rock) rules of evidence. But they do not stand for the proposition that a defendant must be allowed to put on any evidence he chooses. As the Court said in Chambers:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense. In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.

410 U.S. at 302 (citations omitted). See also Crane v. Kentucky, 476 U.S. 683, 690 (1986) ("[W]e have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability-even if the defendant would prefer to see the evidence admitted.").

Here, Jimmy White's statements were not excluded as a result of an application of mechanistic rules of admissibility. Rather, after analyzing the proffer and the corroborating and contradictory circumstances, the state court determined that the White's alleged statements were not sufficiently reliable to warrant its introduction. Thus, the refusal to admit the proffer did not run afoul of the Chambers-Washington-Rock prohibition against arbitrary and mechanistic exclusion of exculpatory evidence.

The Court has reasserted that there is no *per se* constitutional bar against the exclusion of testimony for failure to comply with discovery rules, specifically the notice

provisions of Michigan's rape-shield law. See Michigan v. Lucas, 500 U.S. 145, 153 (1991). The Court stated generally that "[r]estrictions on a criminal defendant's right[ ] ... to present evidence 'may not be arbitrary or disproportionate to the purposes they are designed to serve.' " Id. at 151 (quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987)). But because exclusion could be justified in certain circumstances, the Supreme Court remanded to the state court (which had found a *per se* bar against exclusion) to reevaluate the exclusion in context. *Id.* at 153.

The Petitioner maintains that he was denied the opportunity to present a defense pursuant to Chambers because the unreliable evidence was excluded. The Petitioner, however, fails to recognize the limited application of Chambers articulated in subsequent Supreme Court decisions. In Montana v. Egelhoff, 518 U.S. 37, at 53 (1996), a plurality of the Court recognized that noted the limited application of Chambers to its own facts. *Id.* at 53.

Egelhoff was before the Supreme Court on direct appeal from a Montana criminal conviction. Montana had a law that said a defendant's intoxicated condition could not be admitted to cast doubt on whether he possessed the mental state required as an element of the crime charged. The Montana Supreme Court reversed Egelhoff's conviction, saying that his rights under the Due Process Clause were violated by the statutory exclusion of evidence; the court said he had a right to have the jury consider all relevant evidence to rebut the State's evidence and his intoxicated state was relevant to the issue whether he acted knowingly and purposely. The United States Supreme Court reversed. While noting that Chambers and Crane v. Kentucky, 476 U.S. 683 (1986), say that in the absence of a valid state justification, exclusion of evidence may deprive a defendant of due process, the Court emphasized that a defendant does not have an unfettered right to present evidence, even relevant evidence. Citing Patterson v. New York, 432

U.S. 197 (1977), the Court pointed out that, within reason, states may regulate procedures under which their laws are carried out. Furthermore, the Due Process Clause does not permit federal courts to "engage in a finely tuned review of the wisdom of state evidentiary rules." Id., at 43, quoting Marshall v. Lonberger, 459 U.S. 422 (1983). The Court upheld the Montana law: "[T]the introduction of relevant evidence can be limited by the State for a 'valid' reason." Egelhoff, 518 U.S. at 53.

The limitation on Chambers was subsequently confirmed by an eight-Justice majority, excluding Justice Stevens, in United States v. Scheffer, 523 U.S. 303 (1998). In Scheffer, eight Justices agreed that "Chambers specifically confined its holding to the 'facts and circumstances' presented in that case." 118 S.Ct. at 1268. Even after Chambers, states remain free to fashion rules evidence requiring exclusion of evidence under certain standards.

In Scheffer, the Court revisited the issue of balancing the defendant's right to present a defense against the state's right to prevent unreliable evidence. Scheffer held that a *per se* ban on polygraph evidence did not unconstitutionally constrain a defendant's right to present exculpatory evidence. 523 U.S. at 317. Scheffer distinguished Washington and Rock. The Court noted that the exclusions of evidence in those cases "significantly undermined fundamental elements of the defendant's defense." Id. at 315. Specifically, Scheffer held that barring the admission of an allegedly exculpatory polygraph test did not do so, id. at 309, and it contrasted the polygraph limitation with the preclusions on the testimony of a percipient witness and the testimony of the defendant, respectively, in Washington and Rock, id. at 315-16. The distinction between Washington, Rock, on the one hand, and Scheffer, on the other, is this: In the former, a trial court prohibited presentation of the substantive content of a defendant's testimony or a percipient

witness' testimony, id. at 315, while in the latter a trial court prohibited something much less direct, and much more within the jury's province--third-party evidence of the truthfulness of the substantive content of the defendant's testimony. Id. at 315-16.

Because it is clear that the application of Chambers should be limited to the facts of that case when applied to issues involving hearsay evidence, this Court would have to examine the facts of that case. Chambers involved the impact of Mississippi's voucher rule. Such a *per se* exclusionary standard is not involved in this case where the reliability and corroboration of testimony was the touchstone of the state court's Gregory analysis. In Chambers , the Court went through numerous factors that supported persuasive assurance of trustworthiness concerning the hearsay statements. The South Carolina Supreme Court and trial court analyzed the proffer and the entirety of the case and resolved that the testimony was unreliable against the strong evidence of guilt which the inadmissible evidence did not confront. This reasoned analysis is consistent with Chambers. The standard in South Carolina does not create a *per se* exception to third party guilt evidence, only an exception to unreliable evidence suggesting third party guilt. The failure to admit was not constitutional error.

A criminal defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers, 410 U.S. at 302. For example, a criminal defendant does not have a constitutional right to present evidence that is "incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Montana v. Egelhoff, 518 U.S. 37, 42 (1996) (plurality opinion). And even otherwise admissible evidence may be excluded as a sanction for the defendant's failure to comply with a valid discovery order. See Taylor, 484 U.S. at 414-417; United States v.

Nobles, 422 U.S. 225, 241 (1975). Although the Constitution guarantees a criminal defendant's right to present a defense, it does not guarantee that a jury will hear all of the evidence—or even all of the *relevant* evidence—that he wishes to present. Egelhoff, 518 U.S. at 42.

B. South Carolina's Standards For The Admission of Third Party Guilt Evidence Comport With Evidentiary Practice In Other Jurisdictions.

Holmes contends that the South Carolina standards governing the admission of third party guilt evidence are "idiosyncratic" and therefore suspect in its use. Contrary to that characterization, South Carolina practice is consistent with the practice in other jurisdictions which require sufficient reliability and a connection to the crime charged. In the Holmes opinion, the South Carolina Supreme Court stated the following standard arises from its 1941 holding in State v. Gregory, citing 16 C.J. 560. The court determined that the evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. The state court further stated that before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on

trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty. J.A 364.

These requirements, evolved from the commentators, are not unique to South Carolina. *22A C.J.S. Criminal Law* § 729 (1989); *40A Am Jur 2d Homicide § 349* . The *amicus curiae* brief in support of the Respondent has documented the practices in the various states and federal jurisdictions. Federal courts have consistently held that third-party-guilt evidence is not admissible unless it bears a sufficient connection to the specific crime charged. E.g., Wade v. Mantello, 333 F.3d 51, 57-62 (2d Cir. 2003); DiBenedetto v. Hall, 272 F.3d 1, 7-9 (1st Cir. 2001); Guam v. Ignacio, 10 F.3d 608, 615 (9th Cir. 1993); Glaze v. Redman, 986 F.2d 1192, 1195-1197 (8th Cir. 1993); Cikora v. Dugger, 840 F.2d 893, 897-898 (11th Cir. 1988). Most State courts have held that third-party-guilt evidence is not admissible unless it bears such a connection to the charged offense that it suggests the innocence of the accused. E.g., People v. Arline, 13 Cal. App. 3d 200, 203 (Cal. Ct. App. 1970)(stating that there were no facts to "connect [the third party] with the crime"); State v. Giguere, 439 A.2d 1040, 1043 (Conn. 1981)("We have stated: 'Ordinarily, evidence concerning a third party's involvement is not admissible until there is some evidence which directly connects that third party with the crime.'"). See also State v. Koedatich, 548 A.2d 939, 978- 79 (N.J. 1988)(collecting state and federal cases admitting and excluding evidence based on the existence or nonexistence of a "link" or "connection" between the "third party and the victim or the crime"). In People v. Schultz, 4 N.Y.3d 521 (N.Y. 2005), the court, like South Carolina, held that before such testimony can be received, there must be "proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party." E.g., State v. Larsen, 415 P.2d 685 (Idaho 1966) (same); State v. Downs, 13 P.2d 1 (Wa. 1932) (same).

One state requires proof of an overt act by the third party before evidence of third party guilt is admissible. Gore v. State, 119 P.3d 1268 (Okla. 2005). Some States require that the proffered evidence point directly to the third party's guilt. See Shields v. Arkansas, 166 S.W.3d 28 at 32 (Ark. 2004). Other States require that the proffered evidence raise a reasonable doubt as to the defendant's guilt. E.g, People v. Harris, 118 P.3d 545 (Cal. 2005); People v. Conlogue, 474 A.2d 167, 172 (Me. 1984)(evidence tending to implicate another person, and deflect guilt from the defendant, must be admitted if it is of sufficient probative value to raise a reasonable doubt as to the defendant's culpability"). Some states require the evidence to "raise a reasonable inference of the defendant's innocence." E.g., Carr v. State, 612 S.E.2d 292 (Ga. 2005). Some courts use the Federal Rule of Evidence Rule 401 or the state equivalent and the principal of relevancy to determine admissibility. Commonwealth v. Scott, 564 N.E.2d 370 (Mass. 1990)(upholding the exclusion of evidence that others committed the charged crime on relevancy grounds). Others apply a combination of all three. State v. Caulk, 718 P.2d 99 (Cal.1986).

Some jurisdictions recognize that the breadth of the state's evidence is a factor on whether the conditions for the admission of evidence have been satisfied. In Kansas v. Adams, 124 P.3d 19 (Kan. 2005), the court recognized the probative power that the "wealth of evidence," both direct and circumstantial, against the defendant had in its determination on whether evidence of third party guilt should be admitted. In Glaze v. Redman, 986 F.2d 1192 (8th Cir. 1993), the court in a habeas corpus action arising from Minnesota upheld the rejection the admission of third party evidence based upon the state court conclusion there was overwhelming evidence of the defendant's guilt .

The Petitioner and the amicus curiae essentially are asking for this Court to make uniform evidentiary standards for the admission of third party guilt evidence upon the states. They recognize that courts apply varying standards to admission of this evidence. They contend that this variety of evidentiary tests breeds confusion in the admission of the evidence, particularly when the state courts regularly do not cite any federal authority for their standards. The argument, pared down, seems to be a request that the Court fashion general evidentiary rules, under the guise of interpreting the Due Process Clause, which would govern the admissibility of evidence at state criminal trials. The Supreme Court has not done so in the past, however, and should not do so today. The Federal Constitution does not establish a federal code of evidence to supersede state evidentiary rules in state court trials. Romano v. Oklahoma , 512 U.S. 1, 12 (1994) Cf. Payne v. Tennessee, 501 U.S. 808, 824-825 (1991); Blystone v. Pennsylvania, 494 U.S. 299, 309 (1990).

"[P]reventing and dealing with crime is much more the business of the States than it is of the Federal Government, and ... we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out,' ... and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " Patterson v. New York, 432 U.S. 197, 201-202 (1977) (("[W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States"); Marshall v. Lonberger, 459 U.S. 422, 438, n. 6 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules"). "It has never been thought that [decisions

under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." Spencer v. Texas, 385 U.S. 554, at 564 (1967).

Requiring that a defendant's proffered evidence suggest the third party's sole culpability in the charged offense to such a degree that a juror reasonably could doubt the defendant's guilt is not a unique practice to South Carolina. Holmes has not shown that he is deprived of a "fundamental principle of justice." Egelhoff, 518 U.S. at 43. The purported right of a criminal defendant to present third-party-guilt evidence that does not have a legitimate tendency to prove, or cannot raise a reasonable inference of, the defendant's innocence is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Patterson, 432 U.S. at 202. These decisions thus further demonstrate that South Carolina's rule is fully consistent with the requirements of due process.

C. The South Carolina standard for admissibility does not deprive the defendant of his constitutional right to a jury trial.

The Petitioner contends that the determination by the judge, as opposed to the jury, on the admission of the third party guilt evidence deprived him of him constitutional right to a jury trial. His attempt to create a new constitutional requirement that juries, not judges, make threshold determinations on the admission of such evidence is unsound and not supported by the prior precedent of this Court. "Questions of the admissibility of evidence are for the determination of the court; and this is so whether its admission depend upon matter of law or upon matter of fact." Gila Valley, Globe, & N. Ry. Co. v. Hall, 232 U.S. 94, 103 (1914). As this Court has recognized, the "normal rule that the admissibility of evidence is a question for the court rather than the jury." Lego

v. Twomey, 404 U.S. 477, 490 (1972). In South Carolina, as in other jurisdictions, the admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 564 S.E.2d 87 (S.C. 2002). In State v. Gregory, 16 S.E.2d 532 (S.C. 1941), the Court stated:

> At the outset we repeat the time-honored tenet that ordinarily the conduct of a trial, including the admission and rejection of proffered testimony, is largely within the sound discretion of the trial Judge and his exercise of such will not be disturbed by this Court on appeal unless it can be shown that there has been an abuse of discretion, a commission of legal error in its exercise, and that the rights of the appellant have been thereby prejudiced.....The situation seems to us to have been one peculiarly appropriate for the exercise of discretion as to admissibility of evidence and to guard against the confusion of the jury by the injection of collateral issues.....

Gregory, 16 S.E.2d at 534. A review of the decisions concerning the admission of evidence on third party guilt reveals the plethora of jurisdictions correctly give trial judges the discretion and authority to exclude evidence that lacks the proper indicia of trustworthiness, is incompetent or is unreliable and would lead to jury confusion and an unreliable verdict. Relevant evidence may be excluded for undue prejudice even though no specific exclusionary rule requires exclusion. State v. Alexander, 401 S.E.2d 146 (S.C. 1991). 1

WIGMORE, EVIDENCE § 10a (Tillers rev.1983). See also SCRE, Rule 403.[14]

In Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993), the Court discussed the gatekeeping function of the trial judge in screening expert opinion to ensure it is reliable before its submission to the jury. In Lego, the Court limited the admission of evidence of confessions to "only those confessions that he reliably found, at least by a preponderance of the evidence, had been made voluntarily. " 404 U.S. 484-487. In Huddleston v. U.S. 485 U.S. 681, 690 (1988), the court recognized the responsibility to determine whether a condition has been fulfilled under FRE Rule 104(b) and required the judge to examine all the evidence in the case and decide whether the jury could reasonably find the conditioned fact by a preponderance of the evidence." [15]

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[14]Rule 104(a) of the Federal Rules of Evidence states that "preliminary questions concerning ...the admissibility of evidence shall be determined by the court." Cases that involve the constitutionality of admission or exclusion of evidence at trial have routinely focused on the trial court's role in determining the admissibility of evidence. E.g., Old Chief v. United States, 519 U.S. 172, 180 (1997) (the trial court's discretion to exclude evidence under Fed. R. Evid. 403); Bourjaily v. United States, 483 U.S. 171, 175 (1987) (defining the standard of proof for facts necessary to the trial court's determination whether a hearsay exception applies). As the Court has explained, "[e]vidence is placed before the jury when it satisfies the technical requirements of the evidentiary [r]ules, which embody certain legal and policy determinations." Bourjaily, 483 U.S. at 175.

[15] Court routinely make preliminary rulings as to the admission of evidence. U.S. v. Smithers, 212 F.3d 306 (6th Cir. 2000)(court improperly failed to weigh the Daubert factors); U.S. v. Valasquez, 64 F.3d 844 (3rd Cir. 1995)(court must make preliminary determination concerning expert testimony to guarantee relevance and reliability of expert testimony); U.S. v Sears, 663 F.2d 896 (9th Cir. 1981) (court must hold hearing prior to admitting admission by silence). Where a claim of privilege

The gatekeeping function of the trial judge with the admission of evidence is well founded. As noted above, certain circumstances may exist which despite relevance, would induce a jury verdict on a purely emotional basis, at one extreme, to nothing more harmful than wasting time at the other. These evidentiary determinations do not divest the party of the right to a jury trial, but ensures the right to a reliable, fair and impartial trial.

It is suggested that the gatekeeping function performed in South Carolina deprives the defendant of his right to a trial by jury because the jury is not tasked with determining the credibility and reliability of the evidence when its exclusion is based upon the strength of the state's case. Particularly, he contends that an entire category of evidence will be excluded because the trial judge is convinced of his guilt. The Petitioner misreads the limitation in the South Carolina practice. The defendant was tasked with creating a reasonable inference of his innocence in light of all the circumstances of the case. These circumstances would necessary include the consideration of state's case, because that consideration as with all evidentiary consideration on relevant evidence cannot be made in a vacuum.

Contrary to the claims of the Petitioner, there is not a "category" of cases that the standard excludes. Rather it

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on the ground of state secrets is made , the trial judge will evaluate the respective interests of the government and the opponents. U.S. v. Nixon, 418 U.S. 683 (1974). As noted in FRE Rule 403, the trial judge is frequently tasked with the determination to conduct balancing test between probative and prejudicial value. See U.S. v. McRae, 593 F.2d 700 (5th Cir. 1979) (Rule 403's major function is to exclude evidence of slight probative value dragged in by the heels for the sake of prejudicial effort).

mandates a cases by case evaluation, as in any evidence case of the probative value versus prejudicial effect - nothing more and nothing less.[16] The South Carolina standard insured that where the proffered evidence did gave rise to a reasonable inference that someone other than the defendant actually committed the charged offense, it would be admitted as evidence based upon a review of the entire record. Certain circumstances, such as existed in the Holmes case, may arise where the connection of the third party to the case is not adequately shown by any reasonable inference. The fact that forensic evidence uniquely tied the petitioner to the crime was a strong factor in showing that Holmes had not met his burden of production. The same forensic material excluded the third party as a contributor. In contrast, where the proffered evidence did not give rise to a reasonable inference that someone other than the defendant actually committed the charged offense, it would not be admitted as evidence. When the proffer is unable to overcome independent evidence uniquely pointing to the defendant and excluding any other third party, the task upon the proponent is more difficult to satisfy, but the court is always tasked with the individual consideration of the evidence and its relative strengths.

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[16]The concern xpressed about the feasibility of the pretrial hearing in South Carolina is a red herring. First, as a matter of South Carolina practice the hearing is in the form of a motion in limine and not final. In most cases, making a motion *in limine* to exclude evidence at the beginning of trial does not preserve the issue for review because a motion *in limine* is not a final determination. State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996). Second, that was acknowledged by the Petitioner in this case who renewed his motion as the evidence developed during the trial. Whether the prosecution previews its case in the motion *in limine* would be a function of th trategy in the case. The initial determination as with all evidentiary issues in South Carolina would be subject to the development of the trial.

D. The South Carolina Rule Did Not Reduce The Prosecution' s Burden To Prove Guilt Beyond A Reasonable Doubt.

In contending that the rule of evidence reduces the prosecution burden of proof beyond a reasonable doubt. Under In re Winship, 397 U.S. 358, 363-64 (1970), due process requires that the government prove every element of a criminal offense beyond a reasonable doubt. As the Court later noted in Lego v. Twomey, 404 U.S. 477 (1972), however, Winship "was not concerned with the standards for determining the admissibility of evidence"; rather, Winship merely affirmed the necessity for the prosecution, in order to secure a conviction, to prove every essential element of the offense beyond a reasonable doubt. The fact that there is a burden of production placed upon the defendant for the admission of certain evidence does not create the risks Petitioner now associates with this standard. Equating this evidentiary standard with the deprivation of a jury trial of the facts under Apprendi v. U.S., 530 U.S. 466 (2000), is a remarkable stretch of the constitutional fabric. Nothing removes any factual proof the state must show to convict Holmes. His rhetorical suggestion otherwise must be rejected.

Here the trial court's decision to exclude the third party evidence was purely an evidentiary ruling, not a decision on Holmes' substantive guilt. The Petitioner acknowledges that the rule does not alter the prosecutions burden of proof, but suggests that it allows the state meet the burden of overcoming the prosecution's evidence to get its own competent and relevant evidence before the jury. However, the question bootstraps the answer because the burden placed upon the petitioner was to show the evidence was "competent and relevant exculpatory evidence" by meeting the burden, similar to burden established for other evidence of third party guilt. His complaint is that he lacked the proof to overcome in this setting

the particular strong evidence of forensic guilt in his case. This showing did not lessen the state burden of proof in any manner. Like any other preliminary evidentiary burden of showing competent and relevant probative evidence, the failure on the part of a proponent does not lessen the burden of proof the state must meet. Failing to meet a reasonable inference that clearly points to White as the guilty party, Holmes cannot complain that the state's burden was lightened.

E. The Limitation On The Scope Of Cross-Examination Did Not Violate The Sixth Amendment Where It Was Not Impeachment But An Attempt To Introduce Substantive Third Party Guilt Evidence And Conjecture.

The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers. This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination. On the contrary, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).

Holmes contends that he should have been able through cross-examination to challenge police witnesses credibility and good faith in their investigations by questioning them on the extent that they followed-up in their investigation concerning Jimmy White as a potential suspect, rather than filing charges against Holmes. On appeal, he asserted that this should have been admissible under SCRE Rule 611(b). Holmes proffered his cross-examination of Chief Mobley at J.A. 198-202. The

Court denied his right to inquire of Chief Mobley at that time concerning the investigation of White, particularly as to whether he took White's clothes and shoes into evidence, tht he did draw blood and take White's fingerprints, that White had longer hair than Holmes at that time , but denied that during the early course of the investigation , he had been advised that White was in the area of the incident. J.A. 198-199. The trial court rejected that this evidence was "impeaching" evidence, but concluded that instead it was being presented as evidence of third party guilt which had precluded. J.A. 200-201.

Contrary to the assertions in their brief, the proffer did not include any inquiry about whether he was aware that multiple witnesses had said White has confessed about attacking Ms. Stewart or whether White more closely matched the description of the perpetrator than Holmes, or whether White had a more violent streak than Holmes. The petitioner's speculation about this area is not preserved, particular where no proffer has been made of what the responses would have been from Captain Mobley.

The state court determined summarily that the trial judge did not abuse his discretion in denying the admission. J.A. 366. In addition, relying on State v. Beckham, 513 S.E.2d 606 (S.C. 1999), the Court concluded that alternately that any error in not introducing the impeachment evidence was harmless error. Violations of the confrontation clause of the Sixth Amendment are subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673 (1986)("[W]e hold that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to Chapman harmless-error analysis."). As set forth below, any alleged error must disappear with the limited impact of the proffered questions when substantive third party guilt was not otherwise admitted and would only have sought to have confused the

juror on the specific proffer. Any alleged error was harmless beyond a reasonable doubt under the Delaware v. Van Arsdall test.

III. Relief Is Not Warranted When Any Potential Error In The Exclusion Of The Evidence Is Harmless Error Beyond A Reasonable Doubt Based Upon The Overwhelming Evidence Of Guilt Pointing Directly And Solely To Bobby Holmes As The Perpetrator.

An examination of the record in this case reveals that any error in excluding Petitioner's third-party-guilt evidence, if it was error at all, was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). As the Court stated in Rose v. Clark, 478 U.S. 570, 579 (1986), a judgment of conviction should be affirmed "[w]here the reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt." Even if this Court should find that the South Carolina Supreme Court's determination was in error for the admission of the evidence, its analysis provides persuasive authority that this any error in the exclusion is harmless beyond a reasonable doubt.

In Chapman , the Supreme Court rejected the notion that all constitutional errors at trial necessitated automatic reversal. The Court also held that constitutional errors should be measured against a higher level of scrutiny than non-constitutional errors. Chapman, 386 U.S. at 23, 87 S.Ct. 824. Recognizing that non-constitutional errors can be treated as harmless if there is no "reasonable possibility that the evidence complained of might have contributed to the conviction," the Court in Chapman announced that constitutional errors are harmless only if the reviewing court is "able to declare a belief that [the error] was harmless beyond a reasonable doubt." Id. (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)). Beginning with Chapman and continuing in

a line of decisions thereafter, the Supreme Court has formulated a two-part analysis for assessing the import of constitutional errors committed by trial courts. Under the first facet of the Chapman test, the reviewing court determines whether the error is in a class of violations subject to the harmless error rule ("trial errors") or, instead, is within a rather narrow category of errors that require automatic reversal ("structural errors"). Arizona v. Fulminante, 499 U.S. 279 (1991). Structural errors "affect 'the entire conduct of the trial from beginning to end, such that any attempt by a reviewing court to isolate the impact of the error would be fruitless.' Because a "trial error" occurs during the presentation of t[illegible] case to the jury, the error "may be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."

As assessed in the above statement of the case, the exclusion of the proposed evidence of third party guilt was harmless beyond a reasonable doubt. As noted by the court, the forensic evidence against Holmes was unique in its combination of placing Holmes and the victim together. This evidence included: (1) Holmes' palm print was found just above the door knob on the interior side of the front door of the victim's house; (2) fibers consistent with a black sweatshirt owned by Holmes were found on the victim's bed sheets; (3) matching blue fibers were found on the victim's pink nightgown and on Holmes' blue jeans; (4) microscopically consistent fibers were found on the pink nightgown and on his underwear; (5) Holmes' underwear contained a mixture of DNA from two individuals, and 99.99% of the population other than Holmes and the victim were excluded as contributors to that mixture; and (6) his tank top was found to contain a mixture of his blood and the victim's blood. J.A. 365. However, this unique forensic evidence was not all that connected Holmes uniquely to the crime. He was also

connected by his evidence of the earlier fight and clothing which connected him into the area.

The Petitioner challenges various aspects of the state's case in hindsight. However, closer review reveals that the conclusive record continues to uniquely show Holmes' involvement. Holmes suggests that he was not in close proximity to the victim's home that morning yet his own statement conclusively suggests otherwise.[17] Holmes suggests that there were never any leads to Holmes on the day of the

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[17] **Holmes' Admitted Close Proximity Near Stewart's Home - 870 feet.**

The Brief of Petitioner, p. 3, emphasizes that when Holmes was last seen by the police, he was seen nearly a mile from Ms. Stewart's residence, traveling in the opposite direction, citing J.A. 173, 174. By this, Holmes appears to paint the picture that he was never closer to Ms. Stewart's home than one mile that morning. Holmes trial testimony and his location at the time of the arrest, which reveal that he was within 870 feet of Ms. Stewart's home early that morning.

According to his statement, during his travels after the initial confrontation at his sister's apartment and his flight from the police, he had returned to his sister's place on Cannon Court, but she would not let him in. ROA 2825-26. He stated that he left there and went through an alley, and came out on Main Street (known as Congress Street) until he got to the corner at Williams Liquor store. Id. He then stated he took a path over to Valley Road in front of the Galilee Church, to his father's residence at 124 Valley Road, claiming to have gotten there between 5:00 and 5:30 a.m. Id. He denied going down California Street that week, which intersects Congress Street. Id. Holmes' trial testimony about the route was similar. J.A. 268-271, 274-276, 286-287. In fact, Holmes testified that "I had to pass [California Street] to go to the valley, that's the direction that I'm going in." J.A. 269. Also, J.A. 286 (same).

By his own statement and testimony, during the earlier hours of the morning of the assault, after 5:20, Holmes was within eight hundred and seventy (870) feet of Mary Stewart's home, having changed direction from when the police last saw him. State Exhibit 31, ROA 2857-2859 (224 California Street is 870 feet from South Congress Street).

incident, yet the evidence reveals that there was independent evidence that a person dressed like Holmes was on California Street. [18] Holmes contends that Capt. Mobley had the opportunity to taint the blood evidence, but the evidence suggests otherwise. [19] Holmes questions the development of

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[18] Petitioner claims that the York Police Department did not have any credible leads tying Holmes to the crime as of 11:30 a.m. on December 31, 1989, and that they singled him out because he had offended Patrolman Grady Harper at the earlier incident at the apartment. The Petitioner ignores that Chief Bill Mobley testified that law enforcement had spoken to two witnesses (George Thompson and David Wilson) on December 31 who had seen an individual described as a black male wearing blue jeans and a black hooded sweatshirt in front of Mary Stewart's home in the early morning hours of December 31st. ROA 2800, 2801, 2803, 2806-07. Law enforcement had seen Holmes dressed in this fashion approximately an hour before Mary Stewart was assaulted. ROA 2405-05, 2423.

[19] Holmes also contends that Captain Mobley had access to the blood of Holmes and Stewart and had an opportunity to plant blood evidence. He contends that Ms. Stewart's rape kit disappeared during the investigation, providing Captain Mobley with yet another opportunity to plant evidence. Dr. Gwinn testified he performed a rape kit on Holmes including the drawing of blood. He stated that he sealed the vials of Holmes' blood and then sealed the rape kit box. ROA 2264. Carol Cole testified she performed a partial rape kit (because of the victim's deteriorating condition) on the victim and drew the victim's blood in the rape kit vials. She testified the vials were then sealed, placed in the rape kit box, and the box sealed. ROA 2232, 2236 and 2237. Dr. Macey testified he did a complete rape kit on the victim including drawing her blood, sealed the vials, placed the vials in the rape kit box, and sealed the box. ROA 2284-2285.

Chief Bill Mobley testified that he did not tamper with or break the seals on the rape kits while they were in his custody and that the three rape kits were sealed when they went to SLED. In addition, the clothes of Stewart and Holmes were kept separate. ROA 2803-2804. SLED Agent Larry Gainey Jr. testified that he received SLED items 1-15, plus 16-18 while in York on January 1, 1990. This would have included the three rape kits (items 4, 5 & 6) that remained sealed as he received them from Captain

another tank top found on the path, but it does not undermine the evidence of guilt. [20] Holmes speculates that the palm print was lifted from another location or "planted" by Chief Mobley,

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Mobley. ROA 2956-2957.

Agent John Barron also testified that he received all three rape kits and that when he received them the seals were intact and had not been tampered with and he forwarded the sealed blood tubes to SLED Agent Nancy Greene in Serology. ROA 2999-3000. Nancy Greene testified that the blood tubes from the three rape kits arrived to her from John Barron. The tubes were sealed and had not been tampered with when she received them. In addition, she testified that the tubes were vacuum tubes and that if they had been opened prior to her receiving them it would have been evident to her. She also testified to the fact that the tubes being expired did not affect their efficacy. ROA 3171-3176. See also: ROA 6769 (SLED Forensic Science Evidence Inventory Sheet showing Items 4, 5, and 6 as the numbers assigned to the three rape kits by SLED. Note that this document also indicates all three rape kits were turned over to Agent Larry Gainey of SLED by Captain Mobley on January 1, 1990 for delivery to the SLED laboratory); ROA 6788 (State's Exhibit 44 listing the items Nancy Greene received from John Barron including the blood from the three rape kits); ROA 6825 (a photocopy of the labels taken from all three blood vials). Also J.A. 345.

Although after January 27, 1994, some items that were returned to York Police Department were either lost or misplaced, it is clear that all three rape kits were in the custody of SLED from January 1, 1990 until their return sometime after January 27, 1994. Therefore, Captain Mobley had no access to unsealed blood vials prior to four years after testing.

[20]Holmes also asserts that the prosecution did not properly follow-up on the recovery of the tank top from a path behind the victim's home. The record indicates that a K-9 called out to the scene did not alert on the tank top ROA 2387-2388. Further, John Barron examined the tank top and found nothing of evidentiary value except dog hair. ROA 3003-3004. Finally, Agent Nancy Green processed the tank top and found nothing of evidentiary value. J.A. 235.

but there is no evidence to support this conjecture.[21] The Petitioner complains about the technique for the recovery of the fibers, but there is no evidence to support this conjecture. [22] Holmes also contends that there was no coherent explanation given by Chief Mobley for the delay in shipping one of the paper towels taken from the victim's home to SLED, but a reasonable explanation was given and the evidence results could not have been affected. Finally, the Petitioner speculates

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[21]First, Chief Mobley denied planting any print. ROA 2804. Steve Derrick, an expert in crime scene analysis and an instructor on the techniques of fingerprinting, testified generally as to the difficulty inherent in "planting" a fingerprint. ROA 2901-2905. In addition, he testified that the photo of the palm print *in situ* has the same characteristics as the palm print he was given to examine. Particularly, based upon his expert observation, he did not see any indication of fingerprint forgery or misrepresentation. ROA 2920-22.

[22] The Petitioner contends that the procedure used by Agent Barron for scraping clothes for fiber evidence allowed for possibility of cross-contamination. J.A. 227. Barron testified that the methods he uses to collect fibers from trace evidence is consistent with techniques he learned from the F.B.I.. He used a clean room where there is positive air flow. He also wears a clean lab coat. With each piece of evidence independently evaluated, Barron placed a separate clean piece of paper upon a metal table. He visually scanned the item and initially removed all hair and fibers. ROA 3015-16. He then used a metal spatula and scraped the item. At that point, he views the paper underneath the item for additional fibers and secures them. ROA 3016, 3018. In order to avoid cross-contamination, Barron used a clean room, cleaned the metal table after each use, used clean utensils, used a new sheet of paper for each item. Although the items would be opened in the same room, he treated each item independently and would not open two bags of evidence at the same time. ROA 3020. Barron admitted that there is a difference of opinion on the use of tape or scraping, but declared the this was the method he had been trained on through the F.B. I. courses. ROA 3018-19. Importantly, defense expert John Kilbourn testified that he did not always use the tape method in his analysis of fibers and that he had used the scraping method during his career up until 1980 and had believed it to be reliable. ROA 3920-21.

concerning a failure to test the currency recovered from Holmes for fingerprints, yet there is no subsequent result that suggests it did not come from the victim's home that morning.[23] Further, Jimmy White DNA did not match any of the trace evidence tested. Finally, the third party guilt evidence, as noted by the trial court and the state supreme court was questionable as to its veracity and lack of any details.

In viewing the evidence before this court, it provides a sound basis to concluded that if it was error to exclude the tenuous third party guilt evidence, it was harmless beyond a reasonable doubt. The judgment of the South Carolina Supreme Court must be affirmed.

CONCLUSION

For the reasons set forth above, certiorari should be dismissed as improvidently granted based upon the jurisdictional defect in the presentation to the South Carolina Supreme Court. Alternately, the decision of the Supreme Court of South Carolina must be affirmed.

Respectfully submitted,
Donald J. Zelenka
Assistant Deputy Attorney General
Counsel of Record

January 11, 2006.

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[23]Upon his arrest, Holmes wallet contained $44 dollars, consistent with the reported $40 dollars stolen from Ms. Stewart. The Petitioner criticizes the prosecution's failure to test these items for fingerprints to determine if Ms. Stewart's prints were on these items from Holmes wallet. J.A. 325. However, examiner Steve Derrick testified at that he did not believe the enhanced "physical developer" technology now available to use on paper items existed at the time. However, he admitted that he had not been given any currency to test in 1990. J.A. 222-225.

No. 04-1327

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In The
Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

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ARGUMENT IN REPLY

I. Holmes' Constitutional Claims Are Properly before the Court.

The State argues, as it did in its Brief in Opposition to certiorari, that Holmes' Sixth and Fourteenth Amendment contentions are procedurally barred. Respondent's Brief (RB) at 18-24; Brief in Opposition (BIO) at 3-6. These procedural arguments remain meritless. *See* Reply to Brief in Opposition at 1-3.

In *Baldwin v. Reese*, 541 U.S. 27, 32 (2004), this Court informed the bar that a "litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or . . . by simply labeling the claim 'federal.'"[1] In his opening brief to the South Carolina Supreme Court, Holmes specifically asserted that the trial court's refusal to: (a) permit the defense to present evidence that Jimmy White was the actual perpetrator; (b) permit the defense to cross-examine the investigating officers regarding their failure to investigate evidence implicating Jimmy White; and (c) permit the defense to call Jimmy White as a witness, violated "the due process clause of the fifth amendment and . . . the sixth, eighth and fourteenth amendments to the United States Constitution. . . ." Appellant's Final Opening Brief at 19, 21-22, 26 (thrice repeated).[2] Likewise, Holmes specified that the trial court's ruling that Jimmy White's incriminating statements were inadmissible under South Carolina's hearsay rule violated the Due Process Clause and the Sixth,

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[1] *Howell v. Mississippi*, 543 U.S. 440, 442 (2005), holds the same rule applicable on direct appeal.

[2] In South Carolina, the parties file an Initial Appellant's Brief, an Initial Appellee's Brief and an Initial Reply Brief. South Carolina Rule of Appellate Procedure (SCRAP) 208. After the record on appeal is agreed upon, the parties file "final" versions of the briefs which include citations to the record on appeal. SCRAP 211. The language quoted above is also contained in Holmes' Initial Brief.

Eighth and Fourteenth Amendments to the United States Constitution. *Id.* at 30. Nothing more was necessary to present Holmes' federal claims.[3]

Nor did Holmes' presentation run afoul of any state procedural rules. South Carolina Rule of Appellate Procedure (SCRAP) 208 provides only that the "statement [of issues presented for review] shall be concise and direct as to each issue and may be stated in question form." There is no requirement that the sources of law invoked in relation to each issue be designated in the statement of issues. The State has cited no decision of the South Carolina Supreme Court intimating any such requirement.[4] And the opinion of the South Carolina Supreme Court contains no suggestion – let alone a "'plain statement'" (*Michigan v. Long*, 463 U.S. 1032, 1042 (1983)) – that it found any insufficiency in Holmes' presentation of his federal contentions. *See Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985).[5]

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[3] Throughout the trial, Holmes argued that the Sixth and Fourteenth Amendments entitled him to present evidence of White's guilt. *See, e.g.*, JA 202; ROA 2034, 2035, 2050, 2714-2715, 3646, 3650.

[4] Since SCRAP 208 requires only a specification of the issues presented for review and not a specification of the sources of law invoked in connection with each issue presented, the South Carolina Supreme Court could not have imposed the latter requirement on Holmes even if it had purported to do so. *See Wright v. Georgia*, 373 U.S. 284, 289-291 (1963), and cases cited. That is all the more reason for this Court to decline to attribute to the South Carolina Supreme Court a state procedural ruling it never made.

[5] The State argues that Holmes has waived any right to challenge the judgment below on federal constitutional grounds because he also argued to the South Carolina Supreme Court that the trial court's exclusion of the third party guilt evidence was erroneous as a matter of state law. RB at 20. However, Holmes was not required to choose between a federal constitutional claim and a state-law claim that the trial court's actions were in error. To the contrary, this was sound constitutional practice, consistent with the first principles of federalism. If litigants were required to forgo state-law claims of error in order to challenge the same ruling of the trial court on federal constitutional grounds, occasions for federal constitutional adjudication would be needlessly multiplied, in violation of the basic precept that federal constitutional questions should be decided only as a matter of last

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II. Holmes' Convictions and Death Sentence Were Obtained in Violation of the Sixth and Fourteenth Amendments.

A. Holmes' Case Is Not Materially Distinguishable from *Chambers v. Mississippi*, and *Chambers* Requires Reversal Here.

As explained in Holmes' opening brief, the South Carolina Supreme Court's decision below cannot be squared with this Court's decision in *Chambers v. Mississippi*, 410 U.S. 284 (1973). Petitioner's Opening Brief (PB) at 36-40. Although the facts of the present case are indistinguishable from those in *Chambers*, the State insists that *Chambers* does not apply.[6] That is plainly incorrect.

The State's principal attempt to evade *Chambers*[7] is based on an assertion that the courts below excluded

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resort. *See, e.g., Rescue Army v. Municipal Court*, 331 U.S. 549, 568 (1947); *Liverpool, New York & Philadelphia Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885).

[6] The State also contends that "*Chambers* specifically confined its holding to the 'facts and circumstances' presented in that case." RB at 30. That contention ignores the Court's citations to *Chambers* in a range of subsequent cases, attesting that the decision has force and application beyond its own facts. *See, e.g., Rock v. Arkansas*, 483 U.S. 44 (1987); *Crane v. Kentucky*, 476 U.S. 683 (1986); *Green v. Georgia*, 442 U.S. 95 (1979). Our present point, however, is that even if *Chambers* is viewed as an instance of case-specific error correction, an indistinguishable error requires the same correction here. Indeed, as will be discussed below, the constitutional error in Holmes' case is more egregious than the one in *Chambers*; and the consequences of the error are also more dire because Holmes was sentenced to death. *See Burger v. Kemp*, 483 U.S. 776, 785 (1987).

[7] The State also maintains that *Chambers* involved an application of Mississippi's hearsay and "voucher" rules, whereas the present case concerns a rule concerning third party guilt evidence. RB at 26, 31. To the extent this formal distinction is relevant, it cuts in Holmes' favor. First, despite the voucher and hearsay rules at issue in *Chambers*, Chambers was able to present *some* evidence implicating the third party, including a prior written confession. *Chambers*, 410 U.S. at 291.

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Holmes' third party guilt evidence on the ground that it was unreliable. RB at 31.[5] That is a bald mischaracterization of the record. In fact, the trial judge concluded that the evidence could *not* be rejected on grounds of unreliability. Specifically, he found that "[t]he defendant's witnesses establish to the Court's satisfaction that sufficient evidence exists from which a jury may conclude a third party, Jimmy McCaw White was in the proximity of Mary Stewart's home near the time the State asserts she was beaten and raped." JA 134. He found that the testimony of Joshua Lytle undermined White's alibi and "supports the testimony of the three 'proximity' witnesses. . . ." *Id.* Regarding

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Holmes, on the other hand, was denied any opportunity to show that White committed the crime. Second, the voucher and hearsay rules in *Chambers* had at least the virtue of applying equally to the state and the defense, but the *Gay/Holmes* standard burdens only the defense. This Court has indicated that such asymmetry makes an evidentiary rule less defensible in due process analysis. *See* note 27 *infra*; and *cf. Wardius v. Oregon*, 412 U.S. 470 (1973).

Moreover, the trial court here ruled that Holmes could not call Jimmy White as a witness for the purpose of impeaching him with prior inconsistent statements because he was not "hostile." ROA 3645. This is the functional equivalent of the "voucher" rule in *Chambers*. And, since in South Carolina, prior inconsistent statements are also admissible as substantive evidence, *State v. Copeland*, 300 S.E.2d 63 (S.C. 1982), the court's ruling deprived Holmes' jury of both impeachment and substantive evidence.

[5] The State also attempts to undermine the significance of various parts of the third party guilt evidence, as though each piece was proffered in isolation. *See, e.g.*, RB at 9 n.7, 13, n.8. While some of the State's quarrels with specific pieces of Holmes' proffered evidence are wrong on their own terms, the fundamental defect in all of these arguments is the State's failure to come to grips with the totality of the mutually reinforcing evidence implicating White, including the proximity witnesses, the incriminating statements, prior assaults against elderly women and a sexual penchant for older women, White's lies about his whereabouts on the morning of the crime and his physical appearance. *See Kyles v. Whitley*, 514 U.S. 419, 437 & n.10, 453 (1995).

White's statements, the trial judge found that "[t]he testimony of Thomas Murray, Steven Westbrook, Mattie Mae Scott and Ken Rhodes . . . rise to the level of testimony from which one could conclude Jimmy McCaw White has admitted in the presence of these witnesses that he beat and raped Mary Stewart." JA 135. The trial judge stated he was "bother[ed]" by White's confessions which "perhaps rise to the level of raising some question about [Holmes' guilt]." JA 141. Finally, the court concluded that the testimony of Ken Rhodes "marginally could be taken as evidence of a penchant for older women by Jimmy McCaw White." JA 135.

The trial judge excluded the third party guilt evidence not because of any reliability concerns, but because: (1) he erroneously concluded that White's statements were not statements against penal interest;[9] and, (2) *without the statements*, which were the "engine" that drove the third party guilt "train," the remainder of the evidence was inadmissible. JA 135. Likewise, on appeal, the South Carolina Supreme Court made no determination that the third party guilt evidence was unreliable. Eschewing the trial court's hearsay rationale, it excluded the evidence by comparing its *weight* to that of the prosecution's case and finding that Holmes "simply cannot overcome the forensic evidence against him to raise a reasonable inference of his own innocence." JA 365.

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[9] A detailed explanation of the trial court's error is set forth in Holmes' opening brief at 41-42, n.15.

B. The South Carolina Rule Announced in Holmes' Case Is Aberrant.

1. Other jurisdictions exclude third party guilt evidence only when it involves mere speculation that would confuse the jury.

The plain fact is that the decision below cannot be justified as an instance of a trial judge's screening proffered evidence for unreliability, nor as an application of the ordinary rules used outside of South Carolina to regulate third party guilt evidence. The State and its *amici* attempt to defend South Carolina's rule by likening it to others from which it differs sharply.[10] They argue that

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[10] Both briefs attempt to portray the South Carolina rule as mainstream. RB at 32-34; Brief for Amici States of Kansas, et al. (AB) at 13. We will show in the following pages that any reading of the cases – including all of those collected in the State *amici*'s appendix – belies this portrait. It is interesting to note that *amici*'s appendix needs to misstate the current South Carolina standard applied in Holmes' case to make it look commonplace. It cites the South Carolina Supreme Court's *Holmes* decision in this case (AB at 20a) but omits the critical language of its holding: "Appellant fails to meet the standard set out in *Gregory* and *Gay* due to the strong evidence of his guilt. He simply cannot overcome the evidence against him to raise a reasonable inference of his own innocence." JA 365.

In a few instances in the body of its brief, *amici* misread cases. They cite *State v. Adams*, 124 P.3d 19 (Kan. 2005), as a case that considers the strength of the prosecution's case in deciding whether to admit evidence of third party guilt. AB at 19. *Adams* does no such thing. Rather, it holds that evidence of motive, standing alone, is inadmissible. In *Adams*, unlike Holmes' case, the third party made no inculpatory statements and had no opportunity to commit the crime; the case merely holds that without "competing evidence" of when and how the injuries were inflicted, this absence of any evidence of opportunity doomed the admissibility of the third party guilt evidence. *Amici* also miscite *Glaze v. Redman*, 986 F.2d 1192 (8th Cir. 1993), as a case that considers the strength of the prosecution's case in ruling third party guilt evidence inadmissible. AB at 19. In fact, *Glaze* analyzes the admissibility of third party guilt evidence without any consideration of the prosecution's evidence; then, after holding the trial court's exclusion of the evidence erroneous, it considers the strength of the State's

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most state courts exclude third party guilt evidence unless it "bears such a connection to the charged offense that it suggests the innocence of the accused." RB at 33; AB at 16. Of course Mr. Holmes has no quarrel with such a rule.[11] In applying it, most jurisdictions listed in the State *amici*'s appendix require only that evidence of third party guilt *tend* to create a reasonable doubt as to the defendant's guilt.[12] "Tendency" is a test for *relevance*.[13] Mere proof of motive or opportunity, for example, is often excluded as irrelevant, or, alternatively, because it may confuse or

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evidence in determining whether the error was harmless. Remarkably, *amici* have found only two opinions in the entire nation that do consider the strength of the State's evidence in determining the admissibility of third party guilt, one unpublished, and the other an intermediate court opinion never approved by the State's highest court. *See United States v. Cabrerra*, 1996 WL 135718 (D.C. Cir. Feb. 15, 1996) (unpublished); *People v. Johnson*, 200 Cal. App. 3d 1553 (Cal. Ct. App. 1988). And even those two opinions do not go as far as the South Carolina Supreme Court below has gone: neither requires that a defendant's evidence "overcome" the prosecution's, and neither evaluates the relative weight of prosecution and defense evidence in a way that discounts defense evidence insofar as it is contested but ignores the contested nature of prosecution evidence.

[11] Nor does Holmes quarrel with 3 of the 4 other formulations offered by the State *amici*: that the evidence proffered must "point clearly or directly to the third party's guilt," (AB at 17) "raise a reasonable doubt as to the defendant's guilt," (AB at 17) or "raise a reasonable inference of the defendant's innocence" (AB at 17). *Amici*'s fourth formulation, attributed to California and requiring that a defendant "demonstrate a substantial probability of the third party's guilt" (AB at 17) comes from *People v. Green*, 609 P.2d 468 (Cal. 1980), which was explicitly overruled on this precise point in *People v. Hall*, 718 P.2d 99 (1986). *See State v. Rabellizsa*, 903 P.2d 43, 46 (Haw. 1997), and *State v. Denny*, 357 N.W.2d 12, 16-17 (Wis. Ct. App. 1984).

[12] *See, e.g., State v. Prion*, 52 P.3d 189, 193 (Ariz. 2002) (*en banc*); *McCullough v. United States*, 827 A.2d 48, 55 (D.C. 2003); *Rivera v. State*, 561 So.2d 536, 539 (Fla. 1990); *Joyner v. State*, 678 N.E.2d 386, 389-90 (Ind. 1997); *Commonwealth v. Scott*, 564 N.E.2d 370, 374 (Mass. 1990).

[13] *See, e.g., State v. Israel*, 539 S.E.2d 633, 637 (N.C. 2000).

mislead the jury.[14] Neither the requirement of relevance nor the exclusion of evidence when its prejudicial effect (including jury confusion) outweighs its probative value "require[s] a defendant to provide evidence that substantially proves the guilt of another. . . . [Such tests require only] evidence that creates the possibility of reasonable doubt." *State v. Cotto*, 865 A.2d 660, 669 (N.J. 2005).

Similarly, courts may require that third party guilt evidence be connected to the crime,[15] be inconsistent with the defendant's guilt,[16] establish some direct connection[17] or link[18] between the crime and the third party, or not be too remote or speculative.[19] All these formulations reflect traditional notions of relevance and probative/prejudice balancing.[20] "[P]hrases like 'clear link' are usually shorthand for weighing probative value against prejudice in the context of third-party culpability evidence: if there is some 'clear link' or 'direct connection' between the third-party evidence and the charged crime, courts generally conclude that it is of sufficient probative value to be admissible." *People v. Primo*, 728 N.Y.S.2d 735, 739-740 (N.Y. 2001).

Holmes' proffered third party guilt evidence would almost certainly be admissible under the rule of every jurisdiction catalogued in *amici*'s brief except South Carolina.

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[14] *See, e.g., State v. Denny*, 357 N.W.2d 12, 16 (Wis. Ct. App. 1984); *State v. Rabellizsa*, 903 P.2d 43, 47 (Haw. 1995); *see also Oliva v. State*, 452 S.E.2d 877, 880 (Va. Ct. App. 1995).

[15] *E.g., Moore v. State*, 175 So. 183, 184 (Miss. 1937).

[16] *E.g., Ex parte Hall*, 820 So.2d 152, 156-157 (Ala. 2001).

[17] *E.g., Cleveland v. State*, 91 P.3d 965, 972 (Alaska Ct. App. 2004); *State v. Richardson*, 670 N.W.2d 267, 280 (Minn. 2003).

[18] *E.g., Shields v. State*, 166 S.W.3d 28, 32 (Ark. 2004).

[19] *E.g., People v. Fort*, 618 N.E.2d 445, 455 (Ill. App. Ct. 1993).

[20] *See, e.g., Smithart v. State*, 988 P.2d 583, 586-587 (Alaska 1999) ("[The direct connection] rule derives from considerations of relevance and materiality."); *State v. Marsh*, 102 P.3d 445 (Kan. 2004); *Beaty v. Commonwealth*, 125 S.W.3d 196, 208 (Ky. 2003); *State v. Thomas*, 83 P.3d 970, 988 (Wash. 2004) (*en banc*); *State v. Parr*, 534 S.E.2d 23, 29 (W. Va. 2000).

Evidence that Jimmy White confessed to the crime, that Jimmy White was in the area near the time of the crime, and that Jimmy White had a history of violence against older women would all be considered relevant because it tends to show that White committed the crime and raises a reasonable doubt as to Holmes' guilt.[21] The evidence is not so remote or speculative that it would prejudice or mislead the jury.[22] The evidence establishes a direct connection or link between White and the crime.[23] This is not a case in which Holmes offered mere speculation that White may have had a motive or an opportunity to commit the crime. Holmes proffered no less than four proximity witnesses, plus four independent confession witnesses, plus evidence that White lied about his whereabouts on the night of the crime, plus evidence of White's motive and propensity.

2. South Carolina has expanded its exclusionary rule in two ways that make it diverge radically from the traditional, commonplace state rule.

Until very recently, South Carolina's third party guilt rules were in line with those of other jurisdictions. In 1941, the South Carolina Supreme Court held unremarkably that trial courts could screen third party guilt evidence by asking

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[21] The cases also treat motive evidence as admissible if there is other evidence connecting the third party to the crime. *E.g., State v. Marsh*, 102 P.3d 445 (Kan. 2004); *Missouri v. Chaney*, 967 S.W.2d 47, 55 (Mo. 1998) (*en banc*).

[22] *See, e.g., People v. Hall*, 718 P.2d 99 (Cal. 1986) (*en banc*); *Allen v. State*, 813 N.E.2d 349 (Ind. App. 2004); *Beaty v. Commonwealth*, 125 S.W.3d 196 (Ky. 2003); *Commonwealth v. Conkey*, 819 N.E. 176, 183 (Mass. 2004).

[23] For cases illustrating the showing that is sufficient to establish the requisite link, *see, e.g., People v. Schwartz*, 678 P.2d 1000, 1009 (Colo. 1984); *Parent v. State*, 18 P.3d 348, 351 (Okl. Crim. App. 2000); *Tice v. Com.*, 563 S.E.2d 412, 417 (Va. App. 2002); *State v. Maupin*, 913 P.2d 808 (Wash. 1996).

whether the proffered evidence is "inconsistent with [the defendant's] guilt." *State v. Gregory*, 16 S.E.2d 532, 534 (S.C. 1941). South Carolina's relative orthodoxy lasted throughout the twentieth century. Its Supreme Court upheld trial court rulings that third party guilt evidence was inadmissible when the evidence was too tenuous to support an inference of the third party's involvement, *State v. Williams*, 468 S.E.2d 626, 630 (S.C. 1996); *State v. Cooper*, 514 S.E.2d 584, 588 (S.C. 1999), or when the nature of that involvement did not tend to exculpate the defendant. *State v. Parker*, 366 S.E.2d 10, 11 (S.C. 1988); *State v. Beckham*, 513 S.E.2d 606, 614 (S.C. 1999).

Then, in 2001 in *State v. Gay*, 541 S.E.2d 541, the South Carolina Supreme Court moved beyond the traditional screening of reliability and relevance of third party guilt evidence, and began to take the very different approach of *weighing* defendants' proffers of such evidence against the prosecution's evidence. In finding that Gay's proffered evidence did not raise a reasonable inference of innocence, the court relied in large part on "the strong evidence of . . . [Gay's] guilt – especially the forensic evidence – and the fact that the forensic experts found that the samples from . . . [the third party] did not match any of the evidence gathered in this case." *Gay*, 541 S.E.2d at 545. This approach turns the conventional practice on its head and reasons *backward* from guilt to the inadmissibility of evidence of innocence. The trial judge, having found that the prosecution's case against a defendant is "strong," concludes *on that account* that the defendant's otherwise relevant and reliable proof that s/he did not commit the crime because another person alone did so is too unconvincing to warrant consideration by the jury.

In its *Holmes* decision below, the South Carolina Supreme Court not only followed *Gay*'s approach, it extended it. *Holmes* not only holds that the admissibility of third party guilt evidence depends on the strength of that evidence *compared to the strength of the prosecution case*, it interprets *Gay* as categorically excluding third party guilt evidence when the prosecution has presented "strong" forensic evidence against a defendant. *Holmes*, JA

365 ("[W]here there is strong evidence of . . . [a defendant's] guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the . . . [defendant's] own innocence."). And it extends the *Gay* rule still further by holding that the strength of the State's evidence for this purpose is to be considered without regard to any rebuttal or controversion the defendant has offered. JA 365, n.8 (dismissing Holmes' claims that the forensic evidence was compromised as "go[ing] to the weight of the evidence, not its admissibility"). Together, these two extensions of *Gay* produce the draconian result that once a prosecutor has presented a facially convincing (to the judge) forensic case, the defendant's third party guilt evidence is *eo ipso* inadmissible.

C. The Arbitrary, Categorical Rule Erected in *Holmes* Violates a Defendant's Right to Present a Complete Defense.

Although a defendant's right to present relevant evidence is not unlimited, "restrictions on the . . . right . . . may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock v. Arkansas*, 483 U.S. 44, 55-56 (1987).[24] *Rock* teaches that a categorical rule which "leaves a trial judge no discretion to admit . . . [a species of] testimony, even if the judge is persuaded of its reliability by testimony at a pretrial hearing," violates the right. 483 U.S. at 56 n.12.

The rule announced and applied by the South Carolina Supreme Court below is that kind of rule. Although the trial judge found Holmes' third party guilt evidence reliable, *see* Part II.A, *supra*, the rule categorically excluded

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[24] For a rule to be found unconstitutional under this test, it must also "infringe[] on a weighty interest of the accused." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). A defendant has just such a "weighty interest" in adducing evidence of third party guilt. *See id.*, citing *Chambers*, 410 U.S. 284 (1973) – a case concerning third party guilt evidence – as an example of a weighty interest.

it because of the prosecution's "strong" forensic case. *Holmes*, JA 365. The rule does not require or contemplate a particularized assessment of the probative value of the proffered evidence. A defendant "fails to meet the standard set out in *Gregory* and *Gay* due to the strong evidence of his guilt. *He simply cannot overcome the forensic evidence against him to raise a reasonable inference of his own innocence.*" *Id.*

To assure that a defendant "cannot overcome" a "strong" forensic case against him, the process by which the "strength" of that case is to be measured is non-adversarial. In appraising the state's case, the court below pointedly disregarded Holmes' challenges to the state's forensic evidence. JA 365. That is, the court considered the state's evidence *without regard to any refutation or rebuttal of it* by the defense. The upshot is that all a South Carolina prosecutor now has to do to bar a defendant's third party guilt evidence categorically is to adduce forensic evidence that, *untested*, makes the defendant appear guilty.

Such a rule is antithetical to our adversarial system. "'The need to develop all relevant facts in the adversary system is both fundamental and comprehensive.'" *United States v. Nobles*, 422 U.S. 225, 230-231 (1975). That is why due process guarantees a defendant's "right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). It is why the right is satisfied by nothing less than a "'meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Here, South Carolina denied Bobby Holmes that opportunity.

D. South Carolina Cannot Constitutionally Forbid a Defendant to Present Evidence of Third Party Guilt to the Jury in a Jury Trial When the Evidence is Competent, Reliable, and Central to His Claim of Innocence.

The State argues that Holmes claims an unlimited and unqualified right to present third party guilt evidence. RB at 25. That is not so. Holmes asks only for adherence

to the established rule that a defendant must be permitted to introduce "competent, reliable evidence . . . when such evidence is central to the defendant's claim of innocence." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

At no stage of Holmes' case has any court held that the evidence he proffered was either incompetent, unreliable, inessential to Holmes's defense, or irrelevant to a claim of innocence. To the contrary, as we have seen in Part II.B.2, *supra*, the South Carolina Supreme Court below upheld the exclusion of that evidence by, *first*, deriving from *Gay* a rule that third party guilt evidence is inadmissible unless it overcomes the strength of the prosecution's case against the defendant, and, *second*, adding to this *Gay* rule the corollary that third party guilt evidence *simply cannot* overcome a strong prosecution case based on forensic evidence. In the preceding Part II.C, we explained why the second step in this reasoning – *Holmes*' corollary to the *Gay* rule – palpably offends due process. But the first step – the *Gay* rule itself – fares no better under proper Sixth and Fourteenth Amendment analysis.

Having elected a jury trial, Holmes had a Sixth Amendment "right to demand that a jury find him guilty of all the elements of the crime with which he . . . [was] charged." *United States v. Gaudin*, 515 U.S. 506, 511 (1995). The trial judge could not direct the jury to find him guilty, *see, e.g.*, *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977); *Sandstrom v. Montana*, 442 U.S. 510, 516 n.5 (1979), and while the judge had broad powers to regulate the admissibility of evidence, "the ultimate test of any [evidentiary] device's constitutional validity in a given case[25] remains constant: the device

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[25] The State and its *amici* are correct in their recognition (RB at 25-27; AB at 11) that arbitrary rules excluding entire categories of defense evidence are unconstitutional under this Court's precedents such as *Chambers* and *Rock* and *Crane*, all *supra*. We have invoked that principle in Part II.C, *supra*. But the State and its *amici* are incorrect in asserting that *only* categorical exclusionary rules can violate a defendant's right to present defensive evidence (RB at 27-28, 31; AB at 9, 10, 11-12). In *Olden v. Kentucky*, 488 U.S. 227, 231 (1988), for

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must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *County Court of Ulster County v. Allen*, 442 U.S. 140, 156 (1979).

The *Gay* rule does exactly that. In an inversion worthy of Lewis Carroll,[26] it requires the judge to weigh the prosecution's evidence and determine whether it establishes the defendant's guilt so firmly that he or she should be forbidden to present exculpatory evidence to the jury. Neither the traditional authority of a trial judge to make "preliminary" factual findings[27] on which rules of evidentiary admissibility depend (*see* RB 36-38; AB 20-23), nor the constitutional freedom of the States themselves to make rules excluding "'[evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.'" *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) (plurality opinion), justify conditioning the admissibility of a defendant's exculpatory evidence, as the *Gay* rule does, on the defendant's ability to convince a judge that the evidence "overcome[s]" the State's case for guilt. It is the jury's role to determine whether the evidence of third party guilt is sufficient to establish a reasonable doubt as to the defendant's guilt.

Here, the third party guilt evidence clearly could have created a reasonable doubt in the mind of a reasonable juror. A brief consideration of how such evidence would have been treated if offered by the prosecution is illuminating. The totality of the evidence pointing towards White was more than sufficient to establish probable cause for his arrest or to bind him over for trial. *See, e.g., People v. Rice*, 560 N.Y.S.2d 105, 107-108 (N.Y. City Ct. 1990);

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example, this Court held that the defendant's Sixth Amendment right to confront witnesses against him was violated by the State court's exclusion of evidence on the ground that its probative value was outweighed by the possibility of prejudice.

[26] "Sentence first – verdict afterwards." ALICE IN WONDERLAND, chapter 12.

[27] *See, e.g.*, Fed. Rule Evidence 104.

State v. Fry, 385 N.W.2d 196, 199 (Wis. App. 1985); *People v. Yost*, 659 N.W.2d 604, 610 (Mich. 2003); *People v. Williams*, 628 P.2d 1011, 1013-1014 (Colo. 1981); *Turner v. State*, 549 P.2d 1346, 1348 (Okla. Crim. App. 1976). Indeed, had the State proceeded against White and secured a conviction against him on the basis of the evidence Holmes proffered, the evidence would have been more than sufficient to sustain the conviction. *See, e.g.*, *Brooks v. State*, 905 So.2d 678 (Miss. App. 2004); *State v. Smith*, 415 S.E.2d 409 (S.C. App. 1992); *State v. Freiburger*, 620 S.E.2d 737 (S.C. 2005). Numerous individuals have been found guilty on less evidence than that which Holmes wanted to present to the jury in this case. Only in South Carolina is such a comprehensive, mutually reinforcing case of third party guilt categorically excluded from the trial.

The point of the bind-over and sufficiency comparisons is this: At a minimum, the defendant should be permitted to "go forward" with evidence that would be sufficient for the State to go forward against the third party. Unless the State is asserting that the prosecution somehow has a monopoly on the presentation of unreliable evidence, if the evidence is reliable enough for the prosecution to present to a jury, it must be reliable enough for the defendant to present to a jury.[28]

III. The State Cannot Demonstrate that the Exclusion of Holmes' Evidence Implicating Jimmy White Was Harmless Beyond a Reasonable Doubt.

For an error to be found harmless, the State must prove "beyond a reasonable doubt that the error complained of did

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[28] This "good for the goose, good for the gander" principle has been previously recognized by this Court. *See United States v. Scheffer*, 523 U.S. 303, 316 n.12 (1998) (noting that the evidence rule at issue in *Washington v. Texas*, 388 U.S. 14 (1967), was problematic because it burdened only the defense and not the prosecution).

not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). Clearly, the State cannot meet that burden here.

First, the State's harmless error argument is fundamentally flawed. The State discusses only the prosecution's evidence implicating Bobby Holmes, and it construes that evidence in the light most favorable to the prosecution. In doing so, the State has only demonstrated that the evidence was sufficient to convict. But the question is not "whether, after viewing the evidence in a light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is whether "there is a reasonable possibility that the [error] complained of might have contributed to the conviction." *Yates v. Evatt*, 500 U.S. 391, 403 (1991).[29] "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question." *Id.* at 403. A harmless error analysis, therefore, involves two distinct steps. The first step is a complete and objective review of the evidence. *See id.* at 404 (first, a reviewing court "must ask what evidence the jury actually considered in reaching its verdict"). The second step is to weigh the probative force of the evidence the jury in fact heard against the probative force of the evidence as the jury would have heard it if not for the erroneous exclusion. *Id.*

The State's case against Holmes was entirely circumstantial. There were no eyewitnesses, and Holmes consistently and adamantly denied his guilt at all times,

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[29] The State relies on *Rose v. Clark*, 478 U.S. 570, 579 (1986), for the proposition that "a judgment of conviction should be affirmed '[w]here the reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt.'" RB at 44. This Court has expressly stated, however, that the exact language upon which the State relies, taken out of context and standing on its own, is an incorrect articulation of the harmless error inquiry. *Yates*, 500 U.S. at 402 n.8.

including the time of his arrest, during custodial interrogation and during his testimony at trial. *See, e.g.*, JA 209, 253-54. While the deceased gave varying descriptions of the perpetrator, her earliest statements that that individual was a "short, dark skinned fellow, chunky wide" (JA 142), in his late twenties (JA 149), and with "kind of long hair" (JA 159), bear no resemblance to petitioner. At the time of the offense, Holmes had just turned eighteen and had very short hair; he was also approximately six feet, two inches tall and a very athletic two hundred and thirty five pounds. JA 179. Thus, the State's case for guilt rested almost entirely on the forensic evidence.[30] The State

[30] The State's discussion of the evidence contains a number of misleading or inaccurate statements. For example, the State asserts that two individuals, Gregg Thompson and David Wilson, saw a "black male wearing blue jeans and a black hooded sweatshirt in front of Mary Stewart's home in the early morning hours of December 31st." RB at 47, n.18. Neither Thompson nor Wilson testified at trial or at any hearing in this case. We have only Officer Mobley's testimony that these two men provided him with the information. One must wonder why such important evidence, if true, was not presented at trial.

The State also inaccurately asserts that "petitioner's DNA was . . . found to be consistent with items recovered at the crime scene mixed with the victim's DNA." RB at 8, n.6. Respondent suggests that these unidentified "items" were in addition to the paper towel recovered by Captain Mobley at the crime scene by claiming that "[s]imilarly, Holmes and the victim's (sic) were also the possible contributors to the DNA found on the blue and white striped shirt (Q3) and the other paper towel found at the scene (Q6)." RB at 8, n.6. In fact, the only item of evidence recovered from the crime scene with any alleged mixture of the victim's and petitioner's DNA was the single paper towel recovered by Captain Mobley. JA 246. The State asserted that this mixture was found after PCR DNA testing was completed in 2000. ROA 3522. The State mischaracterizes the testimony of its own experts when it asserts that blood found on the paper towel, petitioner's briefs, jeans, and blue and white striped tank top was initially unidentifiable under 1990 techniques. RB at 7, n.6. Using serology tests, SLED Agent Nancy Greene was unable to identify the blood *type* found on these items in 1990 (ROA 3166, 3181-82) but FBI Agent Lawrence Presley examined the evidence in 1990 using RFLP DNA testing and absolutely excluded Bobby Holmes as a contributor to any of the items of evidence recovered at the crime scene. ROA 3438, 3452, 3459. Agent Presley also absolutely excluded Holmes as a contributor to the blood on the blue and white

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details that evidence at p. 44-50 of its brief, but, in doing so, the State fails to even make a passing reference to the fact that Holmes presented a number of highly trained, well-respected forensic experts whose testimony called into question the reliability and integrity of each and every piece of the State's forensic evidence. This evidence is set forth in detail in Holmes' opening brief at 11-17. Suffice it to say here that the prosecution's DNA evidence, fingerprint evidence and fiber evidence were vigorously challenged at trial by defense experts who criticized the manner in which the evidence was collected, packaged, stored and analyzed.[31] Even the prosecution's own expert, FBI agent Frank Baechtel, admitted that the manner in which the evidence was handled created a risk of contamination. JA 247. Thus, the evidence was far from overwhelming, and a reasonable juror could have harbored a reasonable doubt as to petitioner's guilt based solely on the evidence presented by the defense at trial.[32]

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shirt. Mr. Presley was very confident in his conclusion, stating "[t]hat's an absolute exclusion . . . The bands just don't line up." ROA 3455.

The State suggests that the police had no opportunity for mishandling or manufacturing evidence. RB at 48, n.19. We have explained in PB at 10-17 why this is incorrect.

[31] The following passage from defense expert Dr. E'ustachio discussing problems with the prosecution's DNA evidence is illustrative:

> At the end of the day, it's unreliable tests. The – it wasn't handled in the way that we now know is necessary to prevent contamination from one item to the next or from outside sources. Known samples, which should clearly give us high quality views of those peoples' DNA were clearly degraded. Known samples were handled too close together in time and place with unknown samples. And finally, there are some features of the – where the tracings need to be completely accounted for in order to be scientifically reliable. There are some features of those tracings that did not get interpreted, and it adds up to a test that is not reliable.

JA 310-311.

[32] The State also asserts that "Jimmy White's DNA did not match any of the trace evidence tested." RB at 50. That is as misleading as it is irrelevant. The fundamental flaw in the State's argument is that the

(Continued on following page)

An additional factor in gauging prejudice, ignored by the State, is the prosecutor's closing argument. *See, e.g., Clemons v. Mississippi*, 494 U.S. 738, 753 (1990); *Satterwhite v. Texas*, 486 U.S. 249, 260 (1988); *Chapman v. California*, 386 U.S. at 26. After having persuaded the trial court to exclude all evidence of White's guilt, the prosecutor addressed the defense's contention that the State's forensic evidence was mishandled or manufactured by asking, "[a]nd if you are going to frame them, and it's going to be Bobby Holmes, where is the raping murdering, beating fellow that actually did this thing." JA 338. Given the prosecutor's exploitation of the absence of the very kind of evidence Holmes was precluded from introducing, it is impossible to say that the error in this case did not contribute to the jury's verdict.[33]

Finally, the exclusion of the third party guilt evidence in this case was not harmless because it deprived Holmes of the ability both to fully challenge the State's forensic evidence and to present the jury with a powerful counter-narrative to the State's case for guilt. Holmes' evidence that White committed the offense would have strongly supported his contention that the forensic evidence was contaminated or fabricated, by furnishing the jury a credible alternative theory of the case. This Court recognized in *Old Chief v. United States*, 519 U.S. 172, 188

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police never conducted a sufficient investigation to determine whether there was forensic evidence linking White to the rape and assault which resulted in Ms. Stewart's death. Despite having information that White had the opportunity to commit the crime, and despite being informed of his incriminating statements, the police never obtained or tested any of White's clothing to determine if there was biological material linking him to the attack, nor did they obtain his shoes in order to compare them to an unidentified shoe print found at the scene. JA 252.

[33] Holmes also submits that the prosecutor's closing argument was a separate and distinct violation of the right of fair rebuttal guaranteed by the Due Process Clause. *See Simmons v. South Carolina*, 512 U.S. 154 (1994); *Skipper v. South Carolina*, 476 U.S. 1 (1986). While this Court did not grant certiorari on this issue, the prosecutor's argument is, under this Court's settled precedent, still a relevant and important consideration in determining whether the error was harmless.

(1997), that in light of jurors' expectations about what proper proof should be, juries may well hold the absence of that evidence against a party who fails to provide it. *Id.* at 188, n.9.

Taking into account all of the trial evidence, the prosecutor's argument, and the probative value of the erroneously excluded evidence, the State cannot establish beyond a reasonable doubt that the denial of Holmes' Sixth and Fourteenth Amendment rights to present a defense did not contribute to the jury's verdict.

CONCLUSION

For these additional reasons, the judgment of the Supreme Court of South Carolina should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF *AMICUS CURIAE* OF FORTY PROFESSORS OF EVIDENCE LAW IN SUPPORT OF PETITIONER

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State v. Holmes, 605 S.E.2d 19 (S.C. 2004) 3, 8, 9, 14, 17

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OTHER AUTHORITIES

The Associated Press, *Police Chemist is Rebutted After Man's Execution*, New York Times, 8/30/01, p. A12 10

Andrew Bluth, *Illinois Man Is Finally Cleared in 2 Murders*, New York Times, 3/12/99, p. A20 11

Anne Constable, *Profiles of the Exonerated*, Santa Fe New Mexican, 7/02/00, p. A6 11

Death Penalty Information Center, http://www.deathpenaltyinfo.org/article.php?scid=6&did=110 10

Bill Dedman, *DNA Tests Are Freeing Scores of Prison Inmates*, New York Times, 4/19/99, p. A12 11

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Beth DeFalco & Dennis Wagner, *1st Day Out as a Free Man Inmate Saved by DNA Dives Into Life, Political Debate*, Arizona Republic, 4/10/02, p. 1A 11

Stephen M. Everhart, *Putting a Burden of Production on the Defendant Before Admitting Evidence that Someone Else Committed the Crime Charged: Is It Constitutional?* 76 Neb. L. Rev. 272 (1997) 13

Paul C. Giannelli, *The Abuse Of Scientific Evidence In Criminal Cases: The Need For Independent Crime Laboratories*, 4 Va. J. Soc. Pol'y & L. 439 (1997) 10

Mark Hansen, *Trooper's Wrongdoing Taints Cases*, A.B.A. J., Mar. 1994, p. 22 10

Roma Khanna, *Police Turn Up Hundreds of Boxes of Evidence from Crime Lab*, Houston Chronicle, 8/26/04 available at http://www.chron.com/content/chronicle/special/03/crimelab/index.html 9

David McCord, *"But Perry Mason Made it Look So Easy!": The Admissibility of Evidence Offered by a Criminal Defendant to Suggest that Someone Else Is Guilty*, 63 Tenn. L. Rev. 917 (1996) 13

Maurice Possley et al., *Scandal Touches Even Elite Labs; Flawed Work, Resistance to Scrutiny Seen Across U.S.*, Chicago Tribune, 10/21/04, p. 1 9

Richard Serrano & Ronald Ostrow, *Probe of FBI Lab Reviews 3,000 Cases, Affects None; Trials: Decisions on whether sloppy work biased convictions were left to prosecutors, who rarely notified defense attorneys*, Los Angeles Times, August 17, 2000, p. A1 9

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Don Terry, *DNA Tests and a Confession Set Three on the Path to Freedom in 1978 Murders*, New York Times, 6/15/96, p. A6 11

Michael Vigh, *Evidence Bungled in Slaying; Fingerprints thought to be the defendant's actually the victim's; Motel 6 Case Prosecutors Get Print Surprise*, Salt Lake Tribune 2/19/03, p. D1 9

BRIEF OF FORTY PROFESSORS OF EVIDENCE LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER[1]

This brief *amicus curiae* is submitted on behalf of forty professors of law who teach the law of evidence at various law schools across the United States. They are identified by name and position in the Appendix to this brief. Petitioner Bobby Lee Holmes and Respondent the State of South Carolina have consented to the filing of this brief.

INTEREST OF *AMICI CURIAE*

Amici teach, study and write about the law of evidence as applied by the state and federal courts of the United States. They have a professional interest in the issues presented by this case.

SUMMARY OF ARGUMENT

Petitioner Bobby Lee Holmes was convicted of rape and capital murder and sentenced to death. His main defense was that these crimes were committed by another man. Holmes attempted to call witnesses to prove this defense, including several who would have testified that the other suspect made statements confessing his guilt. The trial court excluded all of this evidence because it

[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

concluded, erroneously, that these statements were inadmissible as hearsay under South Carolina Law.

On appeal, the South Carolina Supreme Court ignored the trial court's hearsay ruling but affirmed the exclusion of Holmes' defense evidence under South Carolina's rule limiting evidence of third party guilt. As reinterpreted in this case, that rule precluded Holmes from presenting his defense that another person had committed these crimes because, in the opinion of the South Carolina Supreme Court, the state's evidence of guilt was so strong that Holmes could not "raise a reasonable inference of his own innocence."

This holding is a denial of Petitioner's right to trial by jury, and a dangerous precedent. It is presented as a rule of evidence, but it is no such thing. It has no parallel in any American common law or statutory rule of evidence known to *amici*. The state supreme court did not purport to exclude particular items of evidence because they were irrelevant or unfairly prejudicial, or for any other traditional purpose that is consistent with preserving and protecting the jury's role as the trier of fact. Instead it approved the exclusion of Holmes' entire defense – regardless of the quality of the evidence he might have presented – because the court was convinced by the state's evidence that he is guilty. Under the rule adopted by the South Carolina Supreme Court, once a trial court judge concludes that a defendant is guilty, that defendant is not entitled to a jury trial on his defense. This rule is a judicial usurpation of the jury's constitutional authority to decide guilt or innocence in criminal prosecutions; it violates the Sixth and Fourteenth Amendments.

Because Petitioner was denied his right to a jury trial on the facts of his defense, he was also denied other constitutional rights in the truncated trial at which he was convicted: his Sixth Amendment right to compulsory process to obtain witnesses in his favor, his Sixth and Fourteenth Amendment right to present a defense, and his Fourteenth Amendment due process right to be convicted only if his guilt is proved beyond a reasonable doubt.

ARGUMENT

The South Carolina Supreme Court Held that it was Proper to Entirely Exclude Petitioner's Primary Factual Claim of Innocence from his Jury Trial for Capital Murder Because that Court was Convinced by the State's Evidence that Petitioner is Guilty. That Decision Violated Petitioner's Sixth Amendment Right to Trial by Jury, and in Consequence it also Violated his Sixth and Fourteenth Amendment Rights to Compulsory Process, to Present a Defense, and to be Convicted Only by Proof Beyond a Reasonable Doubt.

The fundamental issue in this case is the right to trial by jury. The defendant, Bobby Lee Holmes, was convicted of capital murder and sentenced to death.[2] The trial judge excluded all evidence on Holmes' primary factual defense, and the South Carolina Supreme Court affirmed by a vote

[2] Holmes was tried twice. *See State v. Holmes*, 320 S.C. 259, 464 S.E.2d 334 (1995), and *State v. Holmes*, 361 S.C. 333, 605 S.E.2d 19 (2004). Our description of the case is limited to the second trial, the one which is before this Court on review.

of four to one. The state supreme court concluded that Holmes had no right to a jury decision on the facts of his defense because – in that court's judgment – the evidence against him was too strong to permit a finding of innocence. Short of banishing the jury altogether, it is hard to imagine a more basic violation of a criminal defendant's constitutional right to trial by jury, as guaranteed by the Sixth and Fourteenth Amendments. Because Holmes was denied his right to a jury trial on the facts of his defense, he was also denied several other constitutional rights in the truncated jury trial at which he was convicted and condemned: the right to compulsory process to obtain witnesses in his favor, the right to present a defense, and the right to be convicted only if his guilt is proved beyond a reasonable doubt.

The victim in this case, an eighty-six year old woman, was beaten and anally raped by a man who forced his way into her home. She suffered serious brain injuries, lapsed into unconsciousness several hours after the attack, and died ten weeks later. The victim never identified her attacker, and no other witnesses placed the defendant at the scene of the crime. The only evidence that did place Holmes at the scene of this crime was forensic: a palm print said to have come from the victim's apartment, and blood and fiber evidence from the scene and from the defendant's clothing. Biological samples were taken from the victim for two rape kits, but some were compromised and others were lost; they yielded no identifiable evidence.

Holmes claimed that the state's forensic evidence was planted and mishandled, and that the rape and murder were committed by another man, Jimmy McCaw White. He presented his evidence of Jimmy White's guilt at a pretrial hearing held for the sole purpose of determining

admissibility of that evidence. Three witnesses testified that they saw White near the victim's house at about the time of the crime, and a fourth testified that she heard a man who might have been White; four other witnesses testified that they heard White say, variously, that he knew that Holmes was innocent, that he knew who really did these crimes, that he himself raped and killed the victim, and that he "liked" older women. Jimmy White himself was called and voluntarily testified at the pre-trial hearing. White denied that he had committed these crimes, and denied making the statements to which the defense witnesses had testified; White offered an alibi, but the man he claimed to have been with was also called and testified that he had not been with White at the time of the crime. After hearing these witnesses, the trial judge excluded all evidence about Jimmy White from Holmes' trial. That ruling gutted Mr. Holmes' defense.

The trial court's ruling was based on its interpretation of two rules of evidence:

(1) *Evidence of third party guilt.* The trial judge applied the special South Carolina rule that limits the evidence a criminal defendant can offer to prove that another person committed the crime with which the defendant is charged.

> [E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence. . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.

State v. Gregory, 198 S.C. 98, 16 S.E.2d 532, 534-35 (1941) (quoted in the trial court's order of 8/23/2000, *see* Cert. Pet. at 20a). The trial judge agreed that Holmes' evidence appeared to meet this standard. Indeed, how could it not? If the defense witnesses are believed, White is guilty and Holmes is innocent.

(2) *Hearsay.* The trial court judge, however, also ruled that all of the evidence of Jimmy White's admissions of guilt was hearsay, and was inadmissible because it did not qualify for the hearsay exception for statements against interest under South Carolina Rule of Evidence (SCRE) 804(b)(3). In the absence of those confessions, the trial judge found that the "train of evidence" that was required by *State v. Gregory, supra*, was missing its "engine" and included "no facts or circumstances which clearly point to White . . . as the person guilty of beating and raping" the victim, and therefore that the non-hearsay testimony placing White near the scene of the crime was also inadmissible. Cert. Pet. at 23a-24a.

The South Carolina Supreme Court did not endorse (or mention) the trial court's ruling on hearsay, probably because it was insupportable. In South Carolina, evidence of any inconsistent statement by a witness who testifies in the trial at issue is exempt from the hearsay rule.[3] Jimmy

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[3] South Carolina Rule of Evidence 801(d)(1)(A) provides in relevant part:

> (d) **Statements Which Are Not Hearsay.** A statement is not hearsay if –
>
> (1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony. . . .

(Continued on following page)

White testified at the pre-trial hearing, and presumably would have testified at trial if the trial court had not prevented the defendant from calling him. He denied attacking or raping the victim, and he denied making the statements that were attributed to him. Prior statements by White admitting to those crimes are, of course, inconsistent with his testimony; therefore, under South Carolina law, testimony by witnesses who heard him make such statements is not hearsay.[4]

Nonetheless, the South Carolina Supreme Court affirmed the trial court's ruling on a basis that had not been considered at trial. While the trial judge misapplied a

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(Under the parallel federal rule, codified in Federal Rule of Evidence 801(d)(1)(A), a prior inconsistent statement is only admissible as non-hearsay if it was "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.")

[4] It is not relevant to the issues before this Court, but the trial court was also mistaken in its application of SCRE 804(b)(3), governing the "statement against interest" exception to the hearsay rule (which is identical to the parallel federal rule). The trial court concluded that White's extra-judicial confessions were inadmissible under SCRE 804(b)(3) because they did not satisfy the requirement that "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." In fact, the hearsay exception codified in Rule 804(b)(3) has no application to this case at all. It is limited to statements by a declarant who is *unavailable* to testify at trial. *See* SCRE 804(b). White, of course was available; he testified at the pre-trial hearing and would have testified at trial if the trial judge had permitted it. Such testimony at trial would not only have eliminated the concern for reliability that gives rise to the "trustworthiness" requirement of 804(b)(3), but also – under South Carolina law – it would have removed White's prior inconsistent statements from the hearsay rule entirely. *See* SCRE 801(d)(1)(A), discussed *supra*.

traditional rule of evidence, the state supreme court created a new rule, a rule of exclusion that is unprecedented in any common law jurisdiction. The court did not merely exclude the *evidence* Holmes offered, it excluded an entire line of *defense*, regardless of the evidence that could be offered in support – and it did so because the court was persuaded by other evidence that the defendant must be guilty.

Specifically, the South Carolina Supreme Court held that all of the evidence about Jimmy White was inadmissible under its precedents limiting evidence of third party guilt. The court cited *State v. Gay*, 343 S.C. 543, 541 S.E.2d 541 (2001), which was decided after the pre-trial hearing in *Holmes*. In *Gay* the South Carolina Supreme Court held that "[i]n view of the strong evidence of appellant's guilt . . . the proffered evidence about [alternative suspect] Metz did not raise 'a reasonable inference' as to appellant's own innocence," and was therefore inadmissible under *State v. Gregory, supra*. *State v. Gay*, 541 S.E.2d at 545.

The holding in *Gay*, however, was based in large part on the weakness of the defendant's evidence that Metz was in fact guilty: "[W]hile the proffered evidence about Metz may have established evidence of motive and opportunity for Metz to kill the victim, *the evidence simply was not inconsistent with appellant's guilt.*" *Id.* (emphasis added). Plainly, that rationale does not apply here: if Jimmy White's confessions are believed, then Holmes must be innocent. Not surprisingly, the South Carolina Supreme Court in *Holmes* neglected this aspect of the balance it struck in *Gay*. Its discussion of the "standard for admitting third party guilt," 605 S.E.2d at 23-24, includes no mention whatever of any weaknesses in Holmes' evidence of Jimmy White's guilt. Instead, the court summarized a

different body of evidence, the prosecution's forensic evidence against Holmes, and concluded that it was "overwhelming." That judgment was the basis for the court's holding:

> Given the overwhelming evidence of appellant's guilt, the circuit court did not err by excluding the evidence of third party guilt.

605 S.E.2d at 24. As the South Carolina Supreme Court explained, Holmes may not present his defense to the jury because, in the court's view,

> He simply cannot overcome the forensic evidence against him to raise a reasonable inference of his own innocence.

Id.

This holding is incompatible with the defendant's Sixth Amendment right to trial by jury.

Holmes claims that he was the victim of police incompetence in handling critical forensic evidence. This is not a far-fetched claim; it happens all too often.[5] He also says

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[5] *See, e.g.*, Richard Serrano & Ronald Ostrow, *Probe of FBI Lab Reviews 3,000 Cases, Affects None; Trials: Decisions on whether sloppy work biased convictions were left to prosecutors, who rarely notified defense attorneys*, Los Angeles Times, August 17, 2000, p. A1; Michael Vigh, *Evidence Bungled in Slaying; Fingerprints thought to be the defendant's actually the victim's; Motel 6 Case Prosecutors Get Print Surprise*, Salt Lake Tribune 2/19/03, p. D1.; Roma Khanna, *Police Turn Up Hundreds of Boxes of Evidence from Crime Lab*, Houston Chronicle, 8/26/04 (one of dozens of articles on massive crisis at the Houston Police Dept. Crime Lab available at http://www.chron.com/content/chronicle/special/03/crimelab/index.html); Maurice Possley et al., *Scandal Touches Even Elite Labs; Flawed Work, Resistance to Scrutiny Seen Across U.S.*, Chicago Tribune, 10/21/04, p. 1.

that he was the victim of forensic fraud by the police, or at least by one police officer. Unfortunately, this too is a realistic possibility. Horrifying patterns of forensic fraud have come to light repeatedly in the last two decades,[6] and other similar incidents, no doubt, remain hidden from view. Holmes argues that he was convicted and sentenced to death for crimes that another man committed. We know that many defendants have in fact been convicted and sentenced to death in the United States for murders they did not commit.[7]

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[6] *See, e.g., In the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 438 S.E.2d 501 (W. Va. 1993) (judicial investigation of numerous cases of forensic fraud by West Virginia State Trooper Fred Zain); James Walker, ABC World News Tonight, 2/15/94 ("ABC News has found that in just the last five years police have faked prints in New York, California, Alabama, Arizona, Oklahoma, Tennessee, and in Georgia, where Officer Ray Edwards went to jail after he admitted faking fingerprints in twenty-nine cases.") (cited in Paul C. Giannelli, *The Abuse Of Scientific Evidence In Criminal Cases: The Need For Independent Crime Laboratories*, 4 Va. J. Soc. Pol'y & L. 439 (1997)); Mark Hansen, *Trooper's Wrongdoing Taints Cases*, A.B.A. J., Mar. 1994, p. 22 (New York State Police Trooper faked fingerprint evidence); The Associated Press, *Police Chemist is Rebutted After Man's Execution*, New York Times, 8/30/01, p. A12 (false testimony by Oklahoma City police scientist Joyce Gilchrist); John Solomon, *Conviction Overturned in FBI Scandal, the misconduct of a lab scientist was cited*, Philadelphia Inquirer, 5/28/03, p. A10. *See generally* Paul C. Giannelli, *The Abuse Of Scientific Evidence In Criminal Cases: The Need For Independent Crime Laboratories, supra.*

[7] The Death Penalty Information Center has identified 122 American defendants who were sentenced to death and then legally exonerated and released from death row since 1973. *See* http://www.deathpenaltyinfo.org/article.php?scid=6&did=110. Fifteen were exonerated on the basis of DNA evidence, and many others on the basis of evidence proving the guilt of another person, *see infra* note 8, or other equally compelling evidence of innocence.

Frequently these innocent capital defendants were exonerated when the real killer was identified and his guilt proven years after the initial false conviction.[8]

We do not know whether Bobby Lee Holmes is innocent or guilty of the crimes for which he was convicted and condemned to death. It is not for us to say, nor for this Court, nor for any other group of onlookers or judges. This is a decision that should have been made by the jurors who tried Holmes, but the South Carolina judiciary decided to do it for them. The trial court excluded the main evidence in his defense because it misinterpreted the hearsay rule, and the South Carolina Supreme Court affirmed on an even more disturbing basis: because a majority of the justices believed that he was clearly guilty. But the right to a trial by jury is not limited to defendants who "can raise a reasonable inference" that they are innocent. The Sixth Amendment has no exception for defendants who face "overwhelming evidence" from the state. As this Court stated in *Crawford v. Washington*, 541 U.S. 36, 62 (2004), "dispensing with jury trial because a defendant is obviously

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[8] *See, e.g.*, Anne Constable, *Profiles of the Exonerated*, Santa Fe New Mexican, 7/02/00, p. A6 (Thomas Gladish, Richard Gree, Ronald Keine and Clarence Smith, exonerated in New Mexico in 1976); Don Terry, *DNA Tests and a Confession Set Three on the Path to Freedom in 1978 Murders*, New York Times, 6/15/96, p. A6 (Dennis Williams and Verneal Jimerson, exonerated in Illinois in 1996 along with non-capital co-defendants Kenneth Adams and William Rainge); Andrew Bluth, *Illinois Man Is Finally Cleared in 2 Murders*, New York Times, 3/12/99, p. A20 (Anthony Porter, exonerated in Illinois in 1999); Bill Dedman, *DNA Tests Are Freeing Scores of Prison Inmates*, New York Times, 4/19/99, p. A12 (Ronald Williamson, exonerated in Oklahoma in 1999 along with non-capital co-defendant Dennis Fritz); Beth DeFalco & Dennis Wagner, *1st Day Out as a Free Man Inmate Saved by DNA Dives Into Life, Political Debate*, Arizona Republic, 4/10/02, p. 1A (Ray Krone, exonerated in Arizona in 2002).

guilty . . . is not what the Sixth Amendment prescribes." The predicate facts that the South Carolina Supreme Court relied on to exclude the defendant's evidence – the likelihood that the defendant is innocent, the strength of the evidence of his guilt – are precisely the facts that the jury, not the court, must decide.

In *Blakely v. Washington*, 542 U.S. 296 (2004) this Court considered a flexible rule that would govern the extent to which the right to trial by jury limits the permissible scope of fact finding by the judge, rather than the jury, in the process of sentencing. As the Court described it,

> What this [proposed rule] means in operation is that the law must not go too far – it must not exceed the *judicial estimation* of the proper role of the *judge*.

542 U.S. at 307 (emphasis added). The Court rejected that rule, and held that the Constitution prohibits such judicial determinations of the scope of the right to a trial by jury, because

> [T]he very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.

Id. at 308. In the present case, the South Carolina Supreme Court held that Holmes was not entitled to try to convince a jury of his innocence because a majority of the judges on that court were convinced of his guilt. This is a more basic violation of the constitutional principle articulated in *Blakely* than any possible rule the Court considered in *Blakely* itself.

To be sure, there are many situations in which trial courts must evaluate evidence in order to determine its admissibility. The most common is the judge's discretionary authority to exclude evidence because its probative value is substantially outweighed by the danger of unfair prejudice, confusion or waste of time. *See* SCRE 403 and its twin, Federal Rule of Evidence 403. And there are legitimate reasons to be concerned about evidence of third party guilt: it may be vague or speculative; it may have low probative value; it may distract or confuse or prejudice the jury by interjecting extraneous issues. Accordingly, many other states regulate the admissibility of such evidence. But they do it under rules that in one form or another embody the logic of Rule 403. They focus on the evidence that is offered and evaluate its strengths and weaknesses on its own terms.[9]

That, emphatically, is not what the South Carolina Supreme Court did here. The court did not find that Holmes' evidence was unfairly prejudicial or confusing, or that it had low probative value. It focused its attention

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[9] *E.g., State v. Fortin*, 843 A.2d 974, 1002-04 (N.J. 2004) (evidence purporting to suggest third party guilt inadmissible because irrelevant); *People v. Yeoman*, 72 P.3d 1166, 1203-04 (Cal. 2003) (evidence of third party guilt must connect that party to the actual commission of the crime); *State v. Francis*, 836 A.2d 1191, 1199-2000 (Conn. 2003) (same); *Birmingham v. State*, 27 S.W.3d 351, 359-60 (Ark. 2000) (same); *State v. Wilson*, 406 N.W.2d 442, 446-47 (Iowa 1987) (evidence of third party guilt inadmissible because of low probative value and high danger of prejudice); *State v. Holterman*, 687 P.2d. 1097, 1100-01 (Ore. App. 1984) (same). *See generally* Stephen M. Everhart, *Putting a Burden of Production on the Defendant Before Admitting Evidence that Someone Else Committed the Crime Charged: Is It Constitutional?* 76 Neb. L. Rev. 272 (1997); David McCord, *"But Perry Mason Made it Look So Easy!": The Admissibility of Evidence Offered by a Criminal Defendant to Suggest that Someone Else Is Guilty*, 63 Tenn. L. Rev. 917 (1996).

entirely on the prosecution's evidence, which the court concluded was so "overwhelming" that no rational defense was possible. The dissenting justice below (not to mention the defendant) had a different view:

> [A]ppellant presented evidence of mishandling, for example the collection of evidence at the scene using grocery bags from the victim's kitchen, the mislabeling of samples at the lab, and the loss of all blood samples collected from the victim. Further, appellant proffered evidence that representatives of the State had admitted manufacturing blood and palm print evidence against him.

State v. Holmes, supra, 605 S.E.2d at 26 (Pleicones, J., dissenting). We are in no position to judge this dispute, except to note the obvious: what is at stake when evidence is weighed in this fashion is not the admissibility of any particular item or line of inquiry, but rather the global question of the defendant's guilt.[10]

The common law of evidence is in large measure a set of rules that govern the circumstances under which judges may keep evidence from juries. This power must be carefully bounded. Just as "the power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. 316, 431

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[10] The South Carolina Supreme Court did not purport to base its affirmance on a finding that the exclusion of Holmes' evidence was harmless error; nor could it, given the nature of the excluded evidence. Neither is there any suggestion that the courts below were acting to protect Jimmy White's privacy or reputation; the pre-trial testimony against him was given in open court, and he is discussed by name in the published opinion of the South Carolina Supreme Court. In any case, such considerations could not have justified denying a capital defendant the right to present his defense to the jury.

(1819), the power to exclude is the power to decide. We know of no other common law rule of evidence, and no statutory rule in any common law jurisdiction, that permits a court to exclude an entire category of evidence of the defendant's innocence because the court is convinced of his guilt.[11] Nor do we see any limiting principle here. Alibi evidence may also be troublesome or misleading. If this rule is allowed to stand, what would prevent South Carolina or any other state from deciding that a defendant may not present alibi evidence, no matter how strong, if the court is convinced by the state that "he simply cannot . . . raise a reasonable inference of his own innocence"?

If the case against Mr. Holmes truly were overwhelming – if in fact no evidence of another man's guilt could "raise a reasonable inference" that Holmes was innocent – then surely the jury would also have reached that conclusion. On the other hand, if, after hearing all the evidence, the jury thought otherwise, then the jury's decision must

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[11] *State v. Williams*, 593 N.W.2d 227 (Minn. 1999) is similar to the South Carolina Supreme Court's earlier decision in *State v. Gay*, *supra*. In *Williams* the Minnesota Supreme Court excluded evidence that merely showed that a third party had a motive to commit the charged crimes primarily because that evidence "was not sufficient to establish the required . . . foundation," *id.* at 234, of a direct connection between the third party and those crimes. But the *Williams* court added: "Moreover, there was substantial evidence that [the third party] did not commit the charged crimes," including strong evidence that the defendant *did* commit those crimes. *Id.* We are troubled by these cases because they rely in part on prosecution evidence of the defendant's guilt as a factor in decisions to exclude defense evidence of innocence, even though the defense evidence was tangential and could have been excluded on other grounds. Nonetheless, such holdings are a far cry from the rule in this case: that *any* evidence on an entire line of defense may be excluded because unrelated evidence has convinced the court that the defendant is guilty.

govern, not that of the South Carolina Supreme Court. That is what juries are for. We trust juries to make these decisions, not judges. We have built our entire system of criminal investigation and adjudication on that foundation. Our best hope for avoiding false convictions, or even false executions, is a properly functioning system of trial by jury. In any event, that choice is embodied in our Constitution:

> There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.

Blakely v. Washington, supra, 542 U.S. 296 at 313.

The denial of Holmes' right to a jury decision on his guilt or innocence contaminated his trial, and deprived him as well of several other rights that "are essential to due process of law in a fair adversary process." *Faretta v. California*, 422 U.S. 806, 819 n. 15 (1975). Holmes was permitted to call his witnesses before the trial judge but not before the jury that actually tried and convicted him, in violation of his Sixth Amendment right to compulsory process to obtain witnesses in his favor, *Washington v. Texas*, 388 U.S. 14 (1967), and in violation of his Sixth and Fourteenth Amendment right to "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Holmes was also deprived of his due process right to be convicted only if his guilt is proved beyond a reasonable doubt – to his jury. *In re Winship*, 397 U.S. 358 (1970). In *Cool v. United States*, 409 U.S. 100, 104 (1972), this Court held that an instruction that improperly limited

the jury's consideration of testimony by an accomplice who was called by the defense violated *In re Winship* by "substantially reducing the Government's burden of proof." The violation here is worse: the defense witnesses were excluded altogether. Of course, the South Carolina Supreme Court's conclusion that Holmes could not "raise a *reasonable inference* of his own innocence," 605 S.E.2d at 24 (emphasis added), could well mean that after considering the defense as well as the prosecution evidence *the state supreme court* found Holmes guilty beyond a reasonable doubt. If so, that only underlines the central problem: that *court* had no constitutional authority to make that decision.

In *Chambers v. Mississippi*, 410 U.S. 284 (1973), this Court reviewed a murder trial that was in some respects similar to the case before the Court now. Chambers was convicted of killing a police officer; his defense was that a different man, Gable McDonald, had actually shot and killed the victim. McDonald (like Jimmy White in this case) was present at or near the scene of the crime, and there was evidence that McDonald later admitted his guilt four times, one of them in writing and under oath. At a preliminary hearing, however, McDonald repudiated his confessions and testified that he did not shoot the officer. At trial Chambers called a witness who testified that he saw McDonald shoot the officer, and another who saw McDonald with a gun soon after the shooting. Chambers then called McDonald himself and introduced his sworn out-of-court confession. Under questioning from the prosecution, however, McDonald promptly repudiated that confession once again, and the trial court applied Mississippi's "voucher" rule to prevent Chambers from cross-examining McDonald on that repudiation. The trial court

also excluded as hearsay testimony from three witnesses who heard McDonald orally admit to the killing. The Mississippi Supreme Court affirmed both exclusionary rulings. *Chambers v. State*, 252 So. 2d 217 (Miss. 1971). This Court reversed because

> the exclusion of this critical evidence [of McDonald's oral admissions], coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process.

Chambers, supra, 410 U.S. at 302.

Chambers, as the Court pointed out, "establish[ed] no new principles of constitutional law." 410 U.S. at 302. Neither should the present case. Here, as in *Chambers*, the defendant was deprived of the fair trial he was entitled to under time-honored constitutional principles – in this case, the defendant's right to a decision by the jury on his innocence or guilt. But the constitutional deprivation here is worse than that in *Chambers* in two respects:

First, Chambers was allowed to present substantial evidence that Gable McDonald was the real killer, and to argue that defense to the jury. The Court reversed nonetheless because

> Chambers' defense was *far less persuasive* than it might have been had he been given an opportunity to subject McDonald's statements to cross-examination or had the other confessions been admitted.

410 U.S. at 294 (emphasis added). Holmes, by contrast, was not allowed to present any evidence whatever on Jimmy White's guilt.

Second, evidence in Chambers' defense was excluded by "narrow and unrealistic," 410 U.S. at 298, and "mechanistic," 410 U.S. at 302, applications of state-law rules that governed the presentation of evidence by all parties in all trials, civil or criminal – the hearsay rule, and the archaic "voucher" rule that limited a party's right to cross examine and impeach a witness it had called. Holmes' defense, on the other hand, was excluded in its entirety under a special rule that applies to criminal defendants only. *See United States v. Scheffer*, 523 U.S. 303, 316 n. 12 (1998) (noting concern about a rule that "burdened only the defense and not the prosecution"); *Wardius v. Oregon*, 412 U.S. 470, 474-75 (1973) (same).

The constitutional error here is particularly disturbing because it reaches beyond the rights of this individual defendant. In *Chambers* the trial judge violated the Constitution by his rulings on evidentiary objections in that single case, and the Mississippi Supreme Court affirmed on the ground that the judge "did not abuse his discretion." *Chambers v. State, supra*, 252 So. 2d at 220. Accordingly, as the Court noted at the time and since, the decision in *Chambers* was limited to the facts of the case. *Chambers, supra*, 410 U.S. at 302-03; *Scheffer, supra*, 523 U.S. at 316. The problem here is more serious because the South Carolina Supreme Court has published and applied a general rule. Under the opinion below, any evidence of another person's guilt, regardless of its nature, will be kept from the jury in any criminal trial in South Carolina, if the trial judge (or the state supreme court) decides that the prosecution's evidence is "overwhelming."

CONCLUSION

The South Carolina rule on evidence of third party guilt, as elaborated by the state supreme court in this case, is a wolf in sheep's clothing. In form, it is a procedural rule that excludes defense evidence if the requirements for admissibility are not met. In substance it is a judicial usurpation of the jury's constitutional authority to decide the defendant's guilt or innocence: It gives the court the power to prevent the jury from ever hearing the main evidence of the defendant's innocence if the judge is convinced by other evidence that the defendant must be guilty.

THEREFORE, and for the reasons stated above, *amici* respectfully request this Court to reverse the judgment of the South Carolina Supreme Court.

Respectfully submitted,

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In the Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE INNOCENCE PROJECT, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Carella v. California, 491 U.S. 263 (1989) 8

Chamberlain v. Mantello, 954 F. Supp. 499 (N.D.N.Y. 1997) 15, 16

Coffin v. United States, 156 U.S. 432 (1895) 5

Cooper v. Brown, 358 F.3d 1117 (9th Cir. 2004) 13

Duncan v. Louisiana, 391 U.S. 145 (1968) 7

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Godschalk v. Montgomery County District Attorney's Office, 177 F. Supp. 2d 366 (E.D. Pa. 2001) 1

Harvey v. Horan, 285 F.3d 298 (4th Cir. 2002) 1

Morissette v. United States, 342 U.S. 246 (1952) 6

Osborne v. District Attorney's Office for Third Judicial District, 423 F.3d 1050 (9th Cir. 2005) 1

Peek v. State, 488 So. 2d 52 (Fla. 1986) 16

Sandstrom v. Montana, 442 U.S. 510 (1979) 6, 7

State v. Gay, 541 S.E.2d 541 (S.C. 2001) 4

State v. Gregory, 16 S.E.2d 532 (S.C. 1941) 4

State v. Holmes, 605 S.E.2d 19 (S.C. 2004), *cert. granted in part*, 73 U.S.L.W. 3604 et al. (U.S. Sept. 27, 2005) (No. 04-1327) 4, 9, 10, 11

State v. Hunt, 457 S.E.2d 276 (N.C. 1994) 21

State v. Lee, 778 So. 2d 656 (La. App. 4 Cir. 1/4/01) 15

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State v. Munson, 886 P.2d 999 (Okla. Crim. App. 1994) 15

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) 8

United States v. U.S. Gypsum Co., 438 U.S. 422 (1978) 7

Williamson v. Reynolds, 904 F. Supp. 1529 (E.D. Okla. 1995) 24

Supreme Court Rules

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Federal Rules of Evidence

Fed. R. Evid. 401 9

Fed. R. Evid. 402 9

Fed. R. Evid. 403 9

Other Authorities

Associated Press, *Inmates Freed from Death Row at a Glance*, July 6, 2003, LEXIS, News Library. 16

Diana Baldwin, *Experts Disagreed on Hair Analysis*, Daily Oklahoman, May 27, 2001 21

4 W. Blackstone, Commentaries on the Laws of England 343 (1769) 7

Alisa Bralove, *Baltimore County Accepts Plea Deal in 1984 Murder of Rosedale Girl*, Daily Rec., May 21, 2004 19

Edward Connors et al., *Convicted by Juries After Trial*, 35-37 (1996), *available at* http://www.ncjrs.org/pdffiles/dnaevid.pdf (June 1996) 18, 19

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Bill Dedman, *DNA Tests Are Freeing Scores of Prison Inmates*, N.Y. Times, Apr. 19, 1999 20

Beth DeFalco, *DNA May Free 1st Arizonan Inmate Convicted Twice in Murder*, Ariz. Republic, Apr. 5, 2002 22

Scott Dodd, *New Evidence May Free Inmate; Bites on Body Led to Verdict*, Times-Picayune, June 11, 1995 22

Mark Donald, *Lethal Rejection*, Dallas Observer, Dec. 12, 2002 ..... 17, 18

Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. Crim. L. & Criminology 523 (2005) 23

Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 Law & Contemp. Probs. 123 (Autumn 1998) 23

Stephanie Hanes, *'84 Investigation Quick to Overlook the Culprit*, Balt. Sun, May 22, 2004 19

Lisa Hoppenjans & Phoebe Zerwick, *Brown Pleads Guilty to Murder of Sykes*, Winston-Salem J., Dec. 17, 2004 21

Max M. Houck, *Statistics and Trace Evidence: The Tyranny of Numbers*, 1 Forensic Sci. Comm. (1999) .. 14, 15

Larry King Live (CNN television broadcast July 21, 2005) 18

James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030 (2000) 23

Joseph Neff & Michael Biesecker, *Wrongly Convicted Man Freed*, The News Observer, Dec. 25, 2003 21

Robert Nelson, *Ray Krone's Got It All. A New Look. Money. Problem Is, He Can't Seem To Forgive Those Who Screwed Up and Put Him on Arizona's Death Row*, Phoenix New Times, Apr. 21, 2005 22-23

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Offender Information Detail, Texas Department of Criminal Justice, *available at* http://168.51.178.33/webapp/TDCJ/index2.htm 18

Offender Lookup, Oklahoma Department of Corrections, *available at* http://docapp8.doc.state.ok.us 20-21

Plaintiffs' Brief in Support of Summary Judgment, *Fritz v. City of Ada* (E.D. Okla. Jan. 8, 2002) (No. 2000-CV-194) 20

Maurice Possley & Steve Mills, *Crimes Go Unsolved as DNA Tool Ignored*, Chic. Trib., Oct. 26, 2003 2

Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution, and Other Dispatches From the Wrongly Convicted* (2000) 2

Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make It Right* (2003) 2

Henry Weinstein, *Death Penalty Foes Mark a Milestone*, L.A. Times, Apr. 10, 2002 22

Mark Wrolstad, *Hair-Matching Flawed as a Forensic Science: DNA Testing Reveals Dozens of Wrongful Verdicts Nationwide*, Dallas Morning News, Mar. 31, 2002 17-18

Phoebe Zerwick, *New Suspect in Hunt Case*, Winston-Salem J., Dec. 20, 2003 21

INTEREST OF *AMICUS CURIAE*[1]

The Innocence Project, Inc. is a nonprofit legal clinic and criminal justice resource center. Founded by Professors Barry Scheck and Peter J. Neufeld at the Benjamin N. Cardozo School of Law/Yeshiva University in 1992, the Innocence Project provides pro bono legal services to indigent prisoners and death row inmates for whom post-conviction DNA testing can provide conclusive proof of innocence. The Innocence Project pioneered the litigation model that has exonerated, to date, at least 163 innocent persons through post-conviction DNA testing, and has served as lead or co-counsel in the majority of these cases. Currently, the Innocence Project represents more than 100 clients seeking post-conviction DNA testing in dozens of states around the nation.

In addition to seeking relief for its clients under state DNA testing statutes (which the Innocence Project helped author and/or enact into law by contributing technical expertise during the legislative process), the Innocence Project has also served as chief counsel in the leading cases concerning the federal constitutional right of access to potentially exculpatory DNA evidence. These include, inter alia, *Osborne v. District Attorney's Office for Third Judicial District*, 423 F.3d 1050 (9th Cir. 2005); *Harvey v. Horan*, 285 F.3d 298 (4th Cir. 2002); and *Godschalk v. Montgomery County District Attorney's Offic* 177 F. Supp. 2d 366 (E.D. Pa. 2001). The Innocence Project also regularly consults with legislators and law enforcement officials on the state, local, and federal level, conducts research and training,

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[1] Pursuant to Rule 37.6, *Amicus* certifies that no counsel for a party authored this brief in whole or in part. This brief was written by undersigned co.. el. No person or entity other than *Amicus* and its counsel made any monetary contribution to the preparation of this brief.

produces scholarship, and proposes a wide range of remedies to prevent wrongful convictions, while continuing its primary work to exonerate individual clients through post-conviction DNA testing.

SUMMARY OF ARGUMENT

DNA testing has exposed deeply rooted, systemic problems with the criminal justice system, demonstrating with unprecedented certainty that more innocent people suffer in prison or await execution than most lay citizens and legal scholars have ever imagined.[2] Analysis of DNA exonerations has revealed a variety of common causes for wrongful convictions, including faulty eyewitness identification; false confessions; careless or fraudulent forensic evidence; junk science; prosecutorial misconduct; careless and inadequate defense counsel; and racial bias.[3] Of course, in all cases where wrongful convictions occur, the real perpetrator has escaped punishment. Through the use of DNA databases, however, the real perpetrator has been apprehended in more than a third of the post-conviction DNA exonerations.[4]

The profound effects of these wrongful convictions on the criminal justice system have yet to be fully acknowledged or appreciated. In this case, the South Carolina Supreme Court failed to recognize that the existence of apparently "overwhelming" forensic evidence against a defendant does not necessarily mean that he is

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[2] DNA exonerations have "laid bare" the "fabric of false guilt." Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution, and Other Dispatches From the Wrongly Convicted* xv (2000).

[3] *See generally* Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make It Right* 163-202 (2003) (hereinafter "*Actual Innocence*").

[4] In a study by the Chicago Tribune of 115 post-conviction DNA exonerations, there were 51 cases where new suspects were identified through the use of DNA databases. *See* Maurice Possley & Steve Mills, *Crimes Go Unsolved as DNA Tool Ignored*, Chic. Trib., Oct. 26, 2003.

guilty. Indeed, many Innocence Project clients have been exonerated after DNA testing conclusively demonstrated that evidence initially adjudged as "overwhelming" was in fact deeply flawed. This experience has underscored the need for protecting a robust and meaningful presumption of innocence at trial in order to prevent wrongful convictions from occurring in the first place.

The Innocence Project files this *amicus* brief in support of Bobby Lee Holmes's petition because experience dictates and due process requires that every defendant should have a fair opportunity to present evidence of his or her innocence to a jury. Unfortunately, the South Carolina Supreme Court failed to preserve Holmes's right to a fair jury trial by denying Holmes the ability to present to the jury credible and compelling evidence that a third party had committed the crime for which he was accused. Defying logic, the court below excluded this third-party guilt evidence by reference to "overwhelming" forensic evidence against Holmes, which, in the eyes of the court, lessened the relevance of Holmes's proof that somebody else committed the crime. To the contrary, Holmes's evidence that Jimmy White killed Mary Stewart was directly relevant not only to Holmes's general innocence claim, but also to his specific claim that the "overwhelming" forensic evidence against him was actually the product of either contamination or planting.

The prosecution of Bobby Lee Holmes is one of those rare but extremely important cases where a criminal defendant presents substantial and credible evidence that the police may have planted forensic evidence to secure a guilty conviction. Holmes was allowed to present parts of his theory of police misconduct to the jury but his efforts were severely hamstrung by the exclusion of credible third-party guilt evidence. Without this evidence, Holmes's innocence claim was less coherent and believable. The court's decision to exclude this vital evidence thus created a higher risk that the jury convicted an innocent man. In light

of this, *Amicus* files this brief in support of petitioner's request for a new trial.

I. SOUTH CAROLINA'S EVIDENTIARY RULE CANNOT PASS CONSTITUTIONAL MUSTER WHEN IT EXCLUDES EVIDENCE OF THIRD-PARTY GUILT THAT DIRECTLY UNDERMINES THE STRENGTH OF THE PROSECUTION'S EVIDENCE AGAINST THE DEFENDANT

In affirming the lower court's order denying Holmes an opportunity to present evidence of third-party guilt to the jury, the South Carolina Supreme Court relied on the standards set out in *State v. Gregory*, 16 S.E.2d 532, 534-35 (S.C. 1941), and *State v. Gay*, 541 S.E.2d 541, 550 (S.C. 2001) ("*Gregory-Gay* rule") to decree that where there is "strong evidence" of a defendant's guilt, especially where that evidence is forensic, proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the defendant's own innocence. *State v. Holmes*, 605 S.E.2d 19, 24 (S.C. 2004), *cert. granted in part*, 73 U.S.L.W. 3604 et al. (U.S. Sept. 27, 2005) (No. 04-1327). As a result of the circular nature of this rule, the court did not consider how petitioner's third-party guilt evidence undermined the rule's premise that there was "strong" evidence of his guilt. This rule is constitutionally defective as a general matter,[5] inherently illogical and ill-conceived as an evidentiary matter, and is particularly unfair as applied to petitioner, given the plethora of evidence supporting Holmes's theory of fabrication and/or contamination of the forensic evidence. As explained below, it is for these reasons that the Innocence Project urges this Court to grant petitioner's request for a new trial.

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[5] This *amicus* brief does not address the constitutional arguments that South Carolina's rule violates a defendant's right to present a complete defense, as those arguments are addressed by petitioner.

A. South Carolina's Evidentiary Rule Is Unconstitutional Because It Undermines A Defendant's Constitutional Right To A Fair Jury Trial

1. The Presumption of Innocence

The presumption of innocence is a long-recognized and well-settled principle in our criminal justice system that is integral to a defendant's Fourteenth Amendment right to a fair trial. *See Bell v. Wolfish*, 441 U.S. 520, 533 (1979) ("Without question, the presumption of innocence plays an important role in our criminal justice system."); *Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." (citation omitted)); *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."). Because the presumption of innocence can be defeated only when the prosecution convinces the jury of a defendant's guilt with proof beyond a reasonable doubt, "[t]o implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process . . . courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle*, 425 U.S. at 503. The *Gregory-Gay* rule, as interpreted by the South Carolina Supreme Court, completely undermines this bedrock principle and interferes with the fundamental right to a fair trial guaranteed by the Constitution.

As construed and applied by the South Carolina Supreme Court, the *Gregory-Gay* rule compels a court – rather than a jury – to evaluate the strength of the

prosecution's evidence of defendant's guilt without also requiring that the trial court weigh and consider defendant's countervailing evidence. Based on the South Carolina Supreme Court's interpretation, the *Gregory-Gay* rule places the cart before the horse by allowing the court to determine that the evidence against a defendant is "strong" without ever considering the reliability of that evidence in light of the defendant's rebuttal evidence. In evaluating the strength of the prosecution's evidence against a defendant in a vacuum, the *Gregory-Gay* rule strips defendants of their right to present a defense and "'conflict[s] with the overriding presumption of innocence with which the law endows the accused.'" *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979) (quoting *Morissette v. United States*, 342 U.S. 246, 275 (1952)).

The *Gregory-Gay* rule, as interpreted by the South Carolina Supreme Court, violates a defendant's due process rights because it allows a court to determine guilt – "strong" guilt – without requiring the State to carry its full burden of proof beyond a reasonable doubt. In requiring the trial court to consider only the prosecution's evidence, even when the defendant's evidence directly discredits it, the *Gregory-Gay* rule "undermine[s] the fairness of the fact-finding process," *Estelle*, 425 U.S. at 503, by making that process a one-sided *fait accompli*. Moreover, the *Gregory-Gay* rule turns the innocence presumption on its head by declaring that one-sided "strong" evidence of a defendant's guilt means that a defendant cannot raise a reasonable inference of his or her own innocence, rather than first allowing for the evaluation of countervailing evidence to determine *whether* the State can show, beyond a reasonable doubt, that a defendant is guilty. The South Carolina Supreme Court violated the innocence presumption in concluding, based exclusively on the State's evidence, that petitioner could not raise a reasonable inference of his own innocence.

2. The Right to a Jury Trial

The *Gregory-Gay* rule is also constitutionally defective because it "'invade[s] [the] factfinding function' which in a criminal case the law assigns solely to the jury." *Sandstrom*, 442 U.S. at 523 (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 446 (1978)). The constitutional right to a jury trial embodies "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). The right to a jury also "reflect[s] a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id.* at 156; *see also Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (reaffirming the historical principle that "'[t]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . .'" (citing 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)) (emphasis original)).

For Holmes, the jury's fact-finding function was arbitrarily relegated to a single trial court judge who made a pre-trial determination as to whether the third-party guilt evidence should be presented to the jury. What is most compelling about this case is that the South Carolina Supreme Court – in dizzying circularity – affirmed one judge's exclusion of all of petitioner's evidence of third-party guilt, despite the fact that much of that evidence discredited the very evidence on which the South Carolina Supreme Court relied. In so doing, the South Carolina Supreme Court allowed the *Gregory-Gay* rule to serve as a detour around petitioner's right to a jury trial. A

defendant's constitutional right to a jury trial, however, cannot hinge upon one judge's premature evaluation of evidence:

> A defendant may assuredly insist upon observance of this guarantee [of a right to a jury trial] even when the evidence against him is so over-whelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State.

Carella v. California, 491 U.S. 263, 268 (1989) (Scalia, J., concurring) (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977)). Likewise, these constitutional guarantees must be honored in this case, so that petitioner can exercise his right to have a jury evaluate *all* of the relevant evidence.[6]

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[6] Indeed, a jury is particularly well-suited to determine the significance of law enforcement's failure to investigate and prosecute Jimmy White for Mary Stewart's murder. The inquiry is a common-sense one into the motives and veracity of the witnesses in the case and is far less demanding than resolving the vital but highly technical conflicting testimony regarding the forensic DNA evidence in this case. As explained below, important technical problems with the DNA tests were raised by the defense and never answered by the prosecution. Yet without the third-party guilt evidence, the jury had an incomplete context in which to examine and resolve these scientific issues.

B. The *Gregory-Gay* Rule, As Interpreted By The South Carolina Supreme Court, Permits Exclusion Of Third-Party Guilt Evidence Even Where The Strength Of The Prosecution's Evidence Has Been Undermined By Credible Evidence Of Fabrication And Contamination

The flaws in the *Gregory-Gay* rule are demonstrated by its application in this case. The rule is a classic *non sequitur*. Neither as a matter of logic nor reason does it follow that, because the South Carolina Supreme Court concluded that the forensic evidence against Holmes was "strong" and "overwhelming,"[7] Holmes could not raise a reasonable inference of his innocence. This is especially true in this case because there was credible evidence of contamination that undermined the strength of the forensic evidence. Moreover, the excluded third-party guilt evidence, if admitted, might have convinced the jury that the government's forensic evidence was planted or contaminated.

Despite the court's contention that Holmes's claims did not "eviscerate" all of the forensic evidence and other evidence against him, 605 S.E.2d at 24 n.8, as set out below, the defense had a variety of important challenges to the forensic evidence and testimonial evidence that undermined the South Carolina Supreme Court's faulty premise that there was "strong" evidence of his guilt. Beyond the evidence collection problems, the missing evidence, the failure to perform certain tests, and the technical indications of contamination, the third-party guilt evidence itself actually impeached the forensic evidence. It stands to reason that Holmes should have been allowed to

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[7] A court is charged with evaluating the reliability and the relevancy of evidence rather than its "strength" or "overwhelming" nature. *See generally* Fed. R. Evid. 401, 402, 403.

present his third-party evidence so that it could be properly weighed in support of his claim of innocence.

Indeed, the trial court unknowingly highlighted why it was so important for Holmes to have the opportunity to present evidence of third-party guilt when it relied on cases holding that "the fact [that] the forensic evidence may have been compromised by the unprofessional manner in which the evidence was collected goes to the *weight* of the evidence, not to its *admissibility*," *id.* (emphasis added). Based on this proposition, the court should have allowed the third-party guilt evidence to be admitted subject to the weight that the jury would accord it.

1. Petitioner's Evidence Significantly Undermined the Premise of "Strong" Guilt

a. Third-Party Guilt Evidence

In addition to the plethora of third-party guilt evidence pointing to Jimmy White as the real perpetrator of the crime, much of the evidence that Holmes was barred from presenting to the jury raised questions as to whether the forensic evidence against Holmes was fabricated or planted. As part of his proffer of third-party guilt evidence relating to planting and fabrication, Holmes sought to use the testimony of Stephen Westbrook, who testified that Officer James "Boot" Smith and Investigator Beverly Jane Potts came to see him before Holmes's first trial and offered to get him out of jail if he would testify that Holmes had confessed to him. 605 S.E.2d at 23. In addition, Westbrook testified that in June 2000, two months before the pretrial hearing, he was brought to Rock Hill from Kirkland Correctional Institute and was confronted by employees from the solicitor's office who tried to convince him to testify against Holmes in the second trial and who informed him that they had manufactured underwear evidence incriminating Holmes. *Id.*

Westbrook also testified to two admissions supporting petitioner's theory of fabrication. Westbrook testified that an employee of the solicitor's office stated that solicitor's office employees had lifted one of Holmes's palm prints from the county jail door to use against him at trial. *Id.* Westbrook also testified that Jimmy White told him that Officer Boot Smith had told White to keep quiet about his guilt and that he was out to "frame" Holmes and that Holmes's prior attorney urged White to testify against Holmes. *Id.* Although this evidence bears directly on the weight of the State's evidence, no jury was ever able to consider it in determining Holmes's guilt. Most significantly, in excluding this evidence, the South Carolina Supreme Court wholly ignored how the evidence undermined the "strong" evidence of guilt, as if Holmes had no discrediting evidence at all. This uninformed application of the *Gregory-Gay* rule is particularly troubling when viewed in light of the evidence Holmes was permitted to present, as detailed below.

b. Fabrication and Contamination Evidence

The heart of Holmes's defense theory was that all of the physical evidence offered against him, including the DNA evidence, the palm print evidence, and the fiber evidence, could be discredited as unreliable because it all passed through the hands of Captain Mobley, thereby creating the opportunity for fabrication and planting. Transcript ("Tr.") at 4289; *see also* Joint Appendix ("App.") at 180, Tr. at 2482. Holmes's theory was well supported by evidence that demonstrated that the police had the opportunity to plant, that authorities "lost" evidence that could have been used to establish this theory, and that they failed to perform tests that could have confirmed (or disproved) police fabrication and planting.

The defense's expert witness, Dr. Peter D'Eustachio, established that the DNA evidence against Holmes was

unreliable and displayed characteristics consistent with his theory of contamination or planting. There were three items that allegedly contained DNA evidence in this case: Holmes's underwear, his shirt, and a paper towel recovered from Ms. Stewart's apartment. The underwear and paper towel allegedly contained a mixture of both Ms. Stewart's and Holmes's DNA. App. at 308-09, Tr. at 3824. As Dr. D'Eustachio testified, there were important problems with the tests used to support this conclusion.

Initially, Dr. D'Eustachio pointed out that the FBI could not explain the appearance of "low-lying mounds" on the DNA charts. App. at 305-06, Tr. at 3820. Although the laboratory attempted to label these irregularities "dye blobs," Dr. D'Eustachio explained that the irregular mounds appeared in consistent positions on all the samples – a phenomenon quite in contradiction to the known and documented *random* occurrence of real dye blobs. App. at 305-07, Tr. at 3820-23. This was the first reason supporting Dr. D'Eustachio's conclusion that the DNA results were "unreliable." App. at 307, Tr. at 3822-23.

Even more troubling and relevant to Holmes's contamination and planting theories was Dr. D'Eustachio's finding that an allele not attributable to either Ms. Stewart or Holmes appeared at the D3S1358 ("D3") locus on both the paper towel and underwear.[8] App. at 308-13, Tr. at 3823-26, 3844-46. In other words, there was evidence of

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[8] At any particular DNA locus, an individual will have two alleles - one inherited from her mother and one inherited from her father. In this case, Ms. Stewart possessed a 14 allele and a 16 allele at the D3 locus, while Holmes possessed a 15 and 16 allele at the same locus. App. at 309, Tr. at 3825. On both the underwear and paper towel, however, there was an 18 allele clearly visible at the D3 locus that could not be attributed to either Holmes or Stewart. App. at 308-09, 311-13, Tr. at 3824-25, 3844-45. Dr. D'Eustachio explained that "the importance of it [the extra 18 allele] is that we know from looking at their known standards that neither Bobby Lee Holmes nor Mary Stewart is capable of producing type 18 DNA. They literally just don't have it in them." App. at 309, Tr. at 3825.

human DNA on the underwear and towel that could not have come from Ms. Stewart or Holmes. This extra DNA was never explained by the prosecution and is at the very least consistent with a theory of planting or contamination. This finding formed the second basis for Dr. D'Eustachio's conclusion that the DNA tests were "unreliable" and that the evidence was not handled in a manner "necessary to prevent contamination from one item to the next or from outside sources." App. at 310, Tr. at 3826.

Holmes's DNA-planting theory was also supported by testimony showing that Chief Mobley never noted the presence of blood on Holmes's underwear or shirt when he first inventoried the evidence. App. at 195, Tr. at 2621-23, 4293. Not only did the forensic evidence inventory sheet not refer to the presence of any blood, but it also did not contain any request for any scientific tests to be performed. Record on Appeal at 6771-72; Tr. at 4293-94. Miraculously, blood later appeared on these items after Ms. Stewart's blood samples were lost. Tr. at 3373, 3763, 4294-95. EDTA tests, which could provide reliable evidence as to whether the blood on the underwear and shirt came from a blood vial (consistent with a planting theory), were never performed. Tr. at 3765, 4302; *see, e.g., Cooper v. Brown*, 358 F.3d 1117 (9th Cir. 2004) (ordering the district court to order EDTA testing of a T-shirt after Cooper's filing of a habeas application because "[t]he presence of such a preservative [EDTA] would show that his blood was not on the t-shirt at the time of the killings, but was rather placed there at some later time"). Furthermore, Ms. Stewart's paper towel, which allegedly contained a mixture of Holmes's DNA and her DNA, was not sent to the South Carolina Law Enforcement Division ("SLED") for evaluation for nine days. App. at 192-93, Tr. at 2618, 4305.

The defense also sought to discredit the palm print evidence by reminding the jury that Captain Mobley testified that he was alone at the crime scene when he allegedly lifted two handprints, thereby demonstrating that

he had the opportunity to plant evidence. Tr. at 2566, 2595, 4290. No usable prints other than two palm prints were found throughout the entire house. Tr. at 2727, 4290. Significantly, Ms. Stewart's pocketbook, the money allegedly stolen from it, and the telephone were never tested for fingerprints. Tr. 2728, 2735-36, 4303 (pocketbook); App. at 192, 325, Tr. at 2614, 3944, 4303 (money); App. at 209, Tr. at 2728, 2735-36, 4303 (telephone). In addition, both palm prints, which allegedly came from the same door, contained two entirely different striation patterns, potentially indicating that they came from two different surfaces. App. at 214-15, Tr. at 3965, 3990-91, 4291.

Further questions were raised regarding the reliability of the fiber evidence used against petitioner and its accuracy in linking petitioner to the crime. The defense pointed out that the State argued that cotton and polyester fibers from Holmes's sweatshirt matched those found on Ms. Stewart's bed, but failed to explain how Holmes's tank top, which was underneath his sweat shirt, did not have any polyester fibers on it. Tr. at 4297. The defense also pointed out that the State failed to explain the source of unknown amounts of blue acrylic fiber, gold modacrylic fiber and a brown fiber ball. App. at 227-229, Tr. at 3028-30, 4298.

In addition to the issues raised at petitioner's trial about the fiber evidence, recently questions have been raised generally regarding the reliability of "matching" fibers to prove a defendant's presence at the crime scene. FBI Supervisory Physical Scientist Max M. Houck, a defender of microscopic hair comparison, has explained why fiber analysis is scientifically imprecise: "The number of different fiber types found on any one textile, such as clothing, therefore, is potentially very large, making it impossible to track each type to its source or sources." Max M. Houck, *Statistics and Trace Evidence: The Tyranny of Numbers*, 1 Forensic Sci. Comm. (1999). Houck explains that because there are 17 generic classes of manufactured fibers,

over 1,770 fiber manufacturers worldwide, 500 different types of cross-sectional shapes for manufactured fibers (not counting copycats and patent infringements), more than 8,000 dyes and pigments used in the coloring of textile fibers, all of which are assembled into finished textiles by approximately 113,000 manufacturers, the "web of production makes it difficult, if not occasionally impractical, to trace any one product and identify its components to their sources." *Id.* Although Houck concludes that trace evidence such as fibers often can answer "how" a crime was committed, "trace evidence can rarely tell us who definitively" committed the crime. *Id.* The South Carolina Supreme Court considered this unreliable fiber evidence as part of the "overwhelming" case against Holmes despite the cross-contamination evidence, further demonstrating the error of its premise.

In sum, all of the forensic evidence allegedly implicating Holmes - DNA, palm prints, and fibers - suffered from demonstrable reliability errors that undermine the South Carolina Supreme Court's conclusion that such evidence was "strong." At the very least, Holmes showed that planting or contamination was possible and not inconsistent with the scientific data.

2. Application of the *Gregory-Gay* Rule Is Particularly Dire When There Is Evidence of Planting

While rare, evidence planting does occur. *See, e.g., State v. Lee*, 778 So. 2d 656 (La. App. 4 Cir. 1/4/01) (affirming grant of motion for a mistrial and motion to suppress evidence where prosecutor planted evidence in defendant's clothes); *Chamberlain v. Mantello*, 954 F. Supp. 499, 512 (N.D.N.Y. 1997) (granting habeas petition where supervising officer committed perjury and planted evidence linking the inmate to the bicyclist's death and where the prosecution's expert framed the inmate and testified falsely regarding the evidence); *State v. Munson*, 886 P.2d 999 (Okla.

Crim. App. 1994) (overturning conviction where prosecutor deliberately suppressed photographs and reports suggesting defendant was innocent and where forensic evidence was provided by a doctor who later pled guilty to seven felony counts involving autopsies he performed or failed to perform in other cases); *Peek v. State*, 488 So. 2d 52 (Fla. 1986) (acquitting defendant after third retrial where expert testimony concerning hair identification evidence was proven false).[9] These case examples demonstrate why it is imperative that a defendant be permitted to present evidence rebutting the prosecution, including third-party guilt evidence. Indeed, if the State fabricates evidence against a defendant, it may be the defendant's only hope of discrediting it.

As stated in *Chamberlain*, the potential damage to our judicial system from such false evidence is profound:

> Our criminal justice system cannot tolerate perjury and evidence tampering from those whom we trust to enforce the law. Dishonesty by the law enforcement personnel of the State, left uncorrected, is a wellspring of tyranny. To tolerate such an attempt to pervert the truth would tarnish the well deserved reputation of the overwhelming number of police officials who are dedicated to justice.

954 F. Supp. at 512. Petitioner's evidence of third-party guilt is too important for its suppression to be tolerated. Therefore, because the third-party guilt evidence would support the defense's theory of planting, such evidence should at least go to the jury to determine its credibility and weight.

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[9] *See* Associated Press, *Inmates Freed from Death Row at a Glance*, July 6, 2003, LEXIS, News Library.

II. ABSENT THIS COURT'S INTERVENTION TO PROTECT PETITIONER'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE, THERE IS A SIGNIFICANT RISK THAT AN INNOCENT MAN WILL BE EXECUTED AND THE ACTUAL PERPETRATOR WILL REMAIN FREE TO CONTINUE TO ENDANGER THE PUBLIC

Had Holmes been given the opportunity to present evidence of third-party guilt to the jury, the evidence on which he was convicted may have appeared far less "overwhelming." Indeed, as the case examples below demonstrate, DNA testing has exonerated many individuals who were convicted on the basis of an apparent wealth of forensic evidence, which was later discredited. If these defendants had not been given the opportunity to prove their innocence, they could have spent their lives in prison or, even worse, they could have been executed, and the real perpetrators – who were conclusively matched by these same DNA tests – may never have been identified, thereby leaving the public at risk of additional acts of brutality.

A. Christopher Ochoa and Richard Danziger

Christopher Ochoa and Richard Danziger were convicted on the basis of seemingly overwhelming evidence for the rape and murder of Nancy DePriest. Christopher Ochoa was brought to the Austin, Texas police station for questioning a few weeks after the murder, where, after a long interrogation, he gave a detailed confession, telling the police that he committed the crime with his friend, roommate, and fellow employee Richard Danziger. *See* Mark Donald, *Lethal Rejection*, Dallas Observer, Dec. 12, 2002. Ochoa pled guilty to the crime and later testified at Danziger's trial. *Id.* Danziger was convicted on the basis of Ochoa's testimony, in addition to the expert testimony of a State hair examiner who concluded that a single pubic hair found near the victim's body was "microscopically similar" to Danziger's. *See* Mark Wrolstad, *Hair-Matching Flawed as a*

Forensic Science: DNA Testing Reveals Dozens of Wrongful Verdicts Nationwide, Dallas Morning News, Mar. 31, 2002, at 1A. Both men remained in prison for more than a decade. *See* Donald, *supra*.

Post-conviction DNA testing later conclusively exonerated both Ochoa and Danziger by excluding both men as the source of the semen found in the victim's body. *Id.* Instead, the single DNA profile was found to be a perfect match to Achim Marino, a man who had confessed to DePriest's murder years earlier in a letter to then-Governor George W. Bush. *Id.*

Because of the mistaken focus on Ochoa and Danziger as the perpetrators, Marino was free to terrorize at least two more individuals. *See* Offender Information Detail, Texas Department of Criminal Justice, *available at* http://168.51.178.33/webapp/TDCJ/index2.htm. After he murdered Nancy DePriest, Marino committed at least two aggravated robberies. *Id.* At the time of his confession in 1996, he was serving three life sentences for sexual assault and aggravated robbery with a deadly weapon. *Id.* The wrongful conviction of Ochoa and Danziger therefore had real consequences for the lives of other innocent citizens.

B. Kirk Bloodsworth

Another DNA exoneration in the face of seemingly "overwhelming" evidence of guilt is that of Kirk Bloodsworth, who was convicted and sentenced to death in 1985 for the rape and murder of a nine-year-old girl. *See* Edward Connors et al., *Convicted by Juries After Trial*, 35-37 (1996), *available at* http://www.ncjrs.org/pdffiles/dnaevid.pdf (June 1996). Bloodsworth was a twenty-two-year-old man who had recently been honorably discharged from the United States Marine Corps and who had never been arrested. *Larry King Live* (CNN television broadcast July 21, 2005).

At trial, prosecutors introduced extensive eyewitness and physical evidence of Bloodsworth's guilt. *See* Connors, *supra*. Five eyewitnesses testified that they were certain that Bloodsworth was the man they saw with the victim just prior to her murder. *Id.* Police officers testified that during Bloodsworth's first police interrogation, he identified a weapon used in the crime that was not known to the public at the time. *Id.* Bloodsworth's acquaintances testified that he said he had done something "terrible" that day. *Id.* The prosecution presented evidence that the police had received an anonymous call informing them that Bloodsworth was seen with the victim earlier that day and that a shoe impression found near the victim's body was the same size as Bloodsworth's. *Id.* Bloodsworth was found guilty and sentenced to death. *Id.*

In 1993, however, Bloodsworth became the first death row inmate in the nation to be exonerated and released based on post-conviction DNA testing, when those tests excluded him as the source of the semen samples from the crime scene. Alisa Bralove, *Baltimore County Accepts Plea Deal in 1984 Murder of Rosedale Girl*, Daily Rec., May 21, 2004. A decade later, after the Innocence Project convinced the prosecutors to retest the remaining evidence with DNA technology that would permit the assailant's profile to be entered into state and federal DNA data banks, the sample matched the DNA profile of the true assailant, Kimberly Shay Ruffner. *See* Stephanie Hanes, *'84 Investigation Quick to Overlook the Culprit*, Balt. Sun, May 22, 2004. Ruffner was in prison for an attempted rape and murder committed three weeks after the rape and murder of the young girl for which Bloodsworth was initially convicted. *Id.* This serves as another example of the innocent lives that are destroyed in the wake of the wrongful conviction of one individual.

C. Ronald Williamson and Dennis Fritz

In 1987, Ronald Williamson and Dennis Fritz were convicted of the rape and murder of a twenty-one-year-old

Oklahoma woman. Bill Dedman, *DNA Tests Are Freeing Scores of Prison Inmates*, N.Y. Times, Apr. 19, 1999, at A12. The evidence against Williamson and Fritz appeared to be compelling, including detailed testimony from multiple witnesses. Glen Gore, one of the State's chief witnesses, testified that he saw Williamson at the victim's place of employment shortly before her murder. *See* Plaintiffs' Brief in Support of Summary Judgment, *Fritz v. City of Ada* (E.D. Okla. Jan. 8, 2002) (No. 2000-CV-194) ("Fritz Brief"). A prison inmate claimed that Fritz had confessed in detail to the murder and that she had heard Williamson threaten to harm someone's mother as he had the victim. *Id.* Other witnesses testified that the victim had previously complained to a friend that these two men "made her nervous" and that Williamson told the police (while in custody) about a vivid "dream" he had about the crime. *Id.* The State's forensic experts testified that *seventeen* hairs from the crime scene "matched" either Williamson or Fritz, and that upon serological analysis, both men were possible contributors of sperm that was recovered from the victim. Dedman, *supra*.

Once both men were in jail, a DNA profile was finally run on the semen found in the victim's body. Fritz Brief, *supra*. The test results conclusively excluded both Williamson and Fritz. *Id.* The DNA profile from the semen instead matched Glen Gore - the prosecution's star witness. Dedman, *supra*. DNA testing also proved that not one of the seventeen hairs deemed to be "matches" with Williamson or Fritz at the time of trial (under the microscopic analysis then available) belonged to either. *Id.* As a result, both defendants were exonerated and released from prison in 1999. *Id.* Fritz had faced life in prison and Williamson was nearly executed. *Id.*

When the State finally matched the DNA to Gore, he was in prison for an unrelated first-degree burglary, kidnapping, and assault. *See* Offender Lookup, Oklahoma Department of Corrections, *available at* http://docapp8.

doc.state.ok.us (follow "Offender Information" hyperlink; then follow "Offender Lookup" hyperlink; then search "153663" under ODOC#). Gore was in an unsupervised prison work detail and escaped from custody for several days upon learning that Fritz and Williamson were exonerated by DNA evidence. *See* Diana Baldwin, *Experts Disagreed on Hair Analysis*, Daily Oklahoman, May 27, 2001. The State's mistaken focus on Fritz and Williamson permitted Glen Gore, the true rapist and murderer, to remain unaccountable for this crime for years.

D. Darryl Hunt

Darryl Hunt was sentenced to life in prison for the murder of Deborah Sykes, a twenty-five-year-old woman, primarily due to several eyewitness who testified that Hunt was at the scene of the crime around the time that the crime was committed. *See State v. Hunt*, 457 S.E.2d 276 (N.C. 1994). Sykes had been viciously stabbed to death after being raped and beaten on August 10, 1984, in North Carolina. *See* Phoebe Zerwick, *New Suspect in Hunt Case*, Winston-Salem J., Dec. 20, 2003.

Ten years later, in 1994, DNA testing had excluded Hunt as the source of the sperm found in Sykes's body, but prosecutors contended that the evidence was contaminated or belonged to an unidentified co-assailant. Joseph Neff & Michael Biesecker, *Wrongly Convicted Man Freed*, The News Observer, Dec. 25, 2003, at A2. Hunt's attorney requested and obtained additional DNA testing in April 2003 that also excluded Hunt as the assailant. Lisa Hoppenjans & Phoebe Zerwick, *Brown Pleads Guilty to Murder of Sykes*, Winston-Salem J., Dec. 17, 2004, at A1. When the 2003 DNA profile was compared with the national database of convicted felons, it led them to Willard Brown, who had originally been a suspect in Sykes's murder. *Id.* Brown pled guilty to first-degree murder, rape, kidnapping, and robbery of Sykes and was sentenced to life plus ten years in prison. *Id.* Hunt's case

serves as another example of the many years of life that can be lost due to wrongful convictions.

E. Ray Krone

The existence of apparent overwhelming "scientific" evidence also led to the conviction of another individual, Ray Krone, for the vicious murder of Kim Ancona, a thirty-one-year-old woman, who was found on December 29, 1991, nude and stabbed to death in the men's restroom of the bar where she worked. Beth DeFalco, *DNA May Free 1st Arizonan Inmate Convicted Twice in Murder*, Ariz. Republic, Apr. 5, 2002, at 1A. The only "forensic" evidence investigators had were bite marks on the victim's breast and neck. Henry Weinstein, *Death Penalty Foes Mark a Milestone*, L.A. Times, Apr. 10, 2002. Ray Krone also lived near the bar where the crime was committed and was in Ms. Ancona's address book. *Id.* Krone agreed to give the police a dental impression by biting down on a plastic foam cup. *Id.* A dentist helping police at the crime scene examined Krone's bite mark and concluded that it was consistent with the mark on the victim's left breast. Scott Dodd, *New Evidence May Free Inmate; Bites on Body Led to Verdict*, Times-Picayune, June 11, 1995, at A16.

Krone was initially convicted of murder and kidnapping and received a death sentence. DeFalco, *supra*. At a second trial, he received a life sentence instead. *Id.* In 2002, Krone's attorneys requested post-conviction DNA testing of the blood and saliva found on the victim. *Id.* The results excluded Krone and instead matched a man named Kenneth Phillips, who had lived 600 yards away from the location of the crime and who was in the DNA database because he had been convicted of attempted child molestation. *Id.* Phillips was later arrested on charges that he sexually assaulted and attempted to strangle a seven-year-old girl three weeks after Ancona's murder. Robert Nelson, *Ray Krone's Got It All. A New Look. Money. Problem Is, He Can't Seem To Forgive Those Who Screwed Up and Put*

Him on Arizona's Death Row, Phoenix New Times, Apr. 21, 2005.

These examples demonstrate the risk of serious error in our criminal justice system even when the evidence supporting a conviction initially appears unassailable. The need for caution is particularly acute in heinous capital cases, where emotions run high and where community pressure on police and prosecutors to secure convictions can be overwhelming. *See* Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 532 (2005) (citing Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 Law & Contemp. Probs. 123, 129-33 (Autumn 1998); James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030 (2000)). As the cases above demonstrate, the conviction of an innocent person also leaves the real criminal free to continue to endanger the public. Most of all, these cases demonstrate why no defendant should be unreasonably deprived of his right to prove his innocence through DNA testing or evidence of third-party guilt.

CONCLUSION

In an epilogue to his decision vacating Ronald Williamson's conviction, Chief Judge Frank Seay wrote:

> While considering my decision in this case I told a friend, a layman, I believed the facts and law dictated that I must grant a new trial to a defendant who had been convicted and sentenced to death.
>
> My friend asked, "Is he a murderer?"
>
> I replied simply, "We won't know until he receives a fair trial."

> God help us, if ever in this great country we turn our heads while people who have not had fair trials are executed. That almost happened in this case.
>
> ACCORDINGLY, the Writ of Habeas Corpus shall issue . . . .

Williamson v. Reynolds, 904 F. Supp. 1529, 1576-77 (E.D. Okla. 1995). For the foregoing reasons, the Innocence Project urges the Court to grant petitioner a new trial.

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No. 04-1327

In the Supreme Court of the United States

BOBBY LEE HOLMES, PETITIONER

v.

THE STATE OF SOUTH CAROLINA, RESPONDENT

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF FOR THE STATES OF KANSAS, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, HAWAII, IDAHO, KENTUCKY, MICHIGAN, MISSISSIPPI, MISSOURI, NEVADA, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH DAKOTA, AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a State may exclude from a criminal trial "third-party-guilt" evidence that does not give rise to a reasonable inference that someone other than the defendant actually committed the charged offense.

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INTERESTS OF *AMICI CURIAE*

Amici States strongly oppose petitioner's effort to restrict the substantial latitude and "respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Chambers* v. *Mississippi*, 410 U.S. 284, 302-303 (1973). This Court has long recognized that "preventing and dealing with crimes is much more the business of the States than it is of the Federal Government," *Patterson* v. *New York*, 432 U.S. 197, 201 (1977), and it has cautioned that "the Due Process Clause does not permit the federal courts to engage in a finely tuned review of state evidentiary rules," *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983).

Petitioner seeks just this sort of "finely tuned review" of South Carolina's approach to the admission of "third-party-guilt" evidence. Under petitioner's theory, neither South Carolina nor any other State may apply evidentiary rules to exclude evidence that the criminal defendant deems important to his defense, regardless of its reliability, its tendency actually to prove his innocence, or its likelihood to confuse the jury. Indeed, according to petitioner's approach, the defendant's right to a fair trial includes a right to present evidence that does not even raise a reasonable inference that a third party committed the charged offense.

This Court has never adopted such an expansive view of due process, and it has traditionally deferred to the States' efforts to fashion criminal trial procedures aimed at establishing guilt or innocence rather than testing every hypothesis offered by the accused. This case thus implicates the ability of all the States to craft rules of evidence, legislatively or through common-law adjudication, that promote the truth-finding function of criminal trials.

Amici States have varying approaches to the admission of third-party-guilt evidence, but a common goal: to ensure that a criminal trial does not become a forum for the

defendant's speculation. Most of these States require the defendant to show one or more of the following: that his proffered evidence bears a direct connection to the charged offense; that it points clearly to a third party's culpability; or that it raises a reasonable inference of the defendant's innocence—all to ensure that the jury decides criminal cases based not on speculation and conjecture, but on evidence that is relevant and reliable. A summary of the various States' rules appears in the Appendices. Although their approaches differ in certain respects from South Carolina's, *amici* States are uniformly committed to distinguishing evidence that meaningfully bears on the defendant's guilt or innocence from self-serving accusations that achieve little more than misdirection and confusion.

Amici States believe the Constitution preserves their right to adopt and enforce such reasonable evidentiary rules. Restrictions on the admissibility of third-party-guilt evidence have an established pedigree in state and federal courts nationwide, and such restrictions should not be cast aside without strong justification. The Court's decision in this case will have a significant impact on the latitude that States enjoy in their treatment of third-party-guilt evidence. Accordingly, in this important area, *amici* urge the Court to reaffirm both its "traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings" by state courts, *Crane* v. *Kentucky*, 476 U.S. 683, 689 (1986), and its longstanding policy not to "lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson*, 432 U.S. at 201.

STATEMENT

A South Carolina jury convicted petitioner of murder, first-degree burglary, first-degree criminal sexual conduct, and robbery in connection with a brutal attack against 86-year-old Mary Stewart. After finding three aggravating circumstances—that the murder was committed during a burglary, that the murder was committed during criminal

sexual conduct, and that the murder involved physical torture—the jury imposed a sentence of death.[1]

On direct appeal to the Supreme Court of South Carolina, petitioner challenged his conviction on the ground that the trial court improperly excluded evidence that would have shown that another man, Jimmy McCaw White, actually committed the murder. Petitioner proffered two types of evidence: (1) testimony from witnesses placing White in the victim's neighborhood near the time of the murder; and (2) testimony from witnesses suggesting that White had "confessed" to committing the murder.

The trial court held a pretrial hearing to determine whether petitioner could present evidence implicating White in the murder. White himself testified at the pretrial hearing, and his testimony was inconsistent with that of petitioner's witnesses. He denied committing the murder and denied making the "confessions" attributed to him by petitioner's witnesses. In response to petitioner's suggestion that White committed the murder, the State proffered testimony from a forensic examiner from the Federal Bureau of Investigation. According to this examiner, a sample of White's blood was tested and the results *excluded* him as the perpetrator of this crime. Moreover, the victim—who initially survived the attack and described her assailant to police investigators before she died—gave a description that matched the petitioner.

The Supreme Court of South Carolina rejected petitioner's claim on appeal and held that his proffered

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[1] This was petitioner's second trial. A jury had previously found petitioner guilty of the same offenses and sentenced him to death. The Supreme Court of South Carolina affirmed the conviction and the sentence, see *State* v. *Holmes*, 464 S.E.2d 334 (S.C. 1995), and this Court denied certiorari, see *Holmes* v. *South Carolina*, 517 U.S. 1248 (1996). On state post-conviction review, however, petitioner was granted a new trial.

evidence was insufficient to satisfy the requirements of *State* v. *Gregory*, 16 S.E.2d 532 (S.C. 1941), and *State* v. *Gay*, 541 S.E 2d 541 (S.C. 2001), for admission of third-party-guilt evidence. Under those decisions, the admission of such evidence must be "limited to such facts as are inconsistent with [the defendant's] own guilt, *and* to such facts as raise a reasonable inference or presumption as to his own innocence." *Gregory*, 16 S.E.2d at 534 (emphasis added).

Thus, a criminal defendant in South Carolina may not introduce evidence that has "no other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another." *Ibid.* To ensure that third-party-guilt evidence raises a reasonable inference of the defendant's innocence and does not merely cast "bare suspicion" on a third party, state law requires that "before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party." *Gregory*, 16 S.E.2d at 535.

Following these principles, the Supreme Court of South Carolina held in *Gay* that third-party-guilt evidence was properly excluded where the "totality of the evidence against [the defendant] and the nature of the evidence proffered regarding [the third party]" demonstrated that the third-party-guilt evidence "was *not inconsistent* with [the defendant's] guilt and thus would serve merely to cast suspicion" upon the third party. 541 S.E.2d at 544-545 (emphasis added). The defendant in *Gay* had sought to introduce evidence showing that a third party had threatened the victim's life repeatedly, even on the day of her death. *Id.* at 544. The court ruled, however, that this evidence "did not raise a reasonable inference as to [the defendant's] own innocence" because of the "strong evidence of [his] guilt—especially the forensic evidence—and the fact that the forensic experts found that the samples from [the third party] did not match any evidence gathered

in [the] case." *Id.* at 545 (quotations omitted). Although the proffered evidence suggested the third party's motive and opportunity to commit the murder, it did not negate the evidence proving the defendant's guilt. *Ibid.*

Applying *Gregory* and *Gay*, the court below examined the proffered testimony and the evidence presented to the jury and concluded that petitioner's proffered evidence did not create a reasonable inference of his innocence. Specifically, the court noted that the forensic evidence overwhelmingly pointed to petitioner—and petitioner alone—as the victim's attacker. For example, the court noted that fibers consistent with petitioner's sweatshirt and jeans were found on the victim's bed sheets and nightgown; that fibers consistent with the victim's nightgown were found on petitioner's underwear; that petitioner's tank top contained a mixture of his blood and the victim's blood; that petitioner's underwear contained a mixture of DNA from two people and that forensic examination had excluded as the sources of this DNA *99.99% of the population other than petitioner and the victim*. Relatedly, the court cited the testimony of the FBI forensic examiner, who stated that tests performed on White's blood *excluded* him as Mrs. Stewart's attacker.

This evidence of petitioner's guilt was further supported by the victim's own description of her assailant and the *undisputed* fact that petitioner was in the victim's neighborhood only 45 minutes before the crime was committed—much closer to the time of the attack than White's *disputed* appearance in the neighborhood. The court also cited the fact that, although petitioner told the police he had never been inside the victim's apartment, his palm print was found on the inside of her front door.

For all these reasons, the court below concluded that petitioner's proffered third-party-guilt evidence was not inconsistent with his own guilt, did not give rise to a reasonable inference of his innocence, and would have

accomplished nothing more than to cast suspicion on another person.

SUMMARY OF ARGUMENT

I. A criminal defendant's right to present a defense is not absolute, but is subject to reasonable restrictions on the admissibility of evidence. Indeed, the integrity of criminal trials—and their effectiveness in ascertaining the truth—depends in large part on exclusion of unreliable evidence. Thus, although the Constitution guarantees the right to present a defense, it does not guarantee that a jury will hear all of the evidence—or even all of the *relevant* evidence—that the defendant wishes to present. So long as the States' exclusionary rules are not arbitrary or disproportionate to the purposes they are designed to serve, they are valid. This Court, moreover, has generally found due process violations only when state courts have applied their evidentiary rules to mandate exclusion of *entire categories* of evidence, without regard to the particular circumstances of the case and without any exercise of individualized discretion by the trial court.

Here, by contrast, South Carolina's rule on third-party-guilt evidence provides for fact-specific analysis of the reliability of third-party guilt evidence, and is therefore valid under the Due Process Clause. This conclusion is confirmed by longstanding practice in the federal courts and in the courts of other States.

II. Requiring a criminal defendant to demonstrate that his third-party-guilt evidence raises a reasonable inference of his innocence does not violate his Sixth Amendment right to a jury trial. Questions of admissibility are for courts, not juries, and the federal and state courts in our constitutional system have always based admissibility determinations on whether the proponent has established certain predicate facts by a preponderance of the evidence—even in criminal cases. Although the State must prove each element of the

crime at issue beyond a reasonable doubt, the standards for determining the admissibility of evidence are not governed by the reasonable doubt standard. That is true in the federal system as well as the vast majority of the States.

South Carolina's rule, which requires only that the defendant's third-party guilt evidence raise a reasonable inference of his innocence, therefore does not violate the Sixth Amendment.

III. Even if this Court were to conclude that South Carolina's application of its rules on third-party-guilt evidence was erroneous in this case, any such error would be subject to harmless-error review. Most constitutional errors are "trial errors" that are subject to harmless error analysis, and generally do not involve the sort of "structural defect" that affects the whole framework of the trial and requires reversal of the conviction. Indeed, this Court has already recognized that Sixth Amendment errors are subject to harmless-error analysis.

ARGUMENT

I. A Criminal Defendant's Right To Present A Defense Does Not Trump States' Reasonable Restrictions On The Admissibility Of Evidence.

As a general matter, the Constitution does not displace the States' rules of evidence. Although a criminal defendant has a right to present a complete defense, he must do so within ordinary trial procedures and rules of evidence. The States have wide latitude to prescribe such rules of evidence, and this Court will invalidate an evidentiary rule only in highly unusual circumstances. Far from creating any such unusual circumstance, South Carolina's approach to third-party-guilt evidence comports with both this Court's decisions and historic practice in federal and state courts.

A. Under this Court's decisions, the right to present a defense is subject to reasonable restrictions that provide for an individualized analysis of the probative value of the defendant's evidence.

A criminal defendant's right to present evidence in his defense is not absolute, but is "subject to reasonable restrictions." *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998). Such restrictions serve "legitimate interests in the criminal trial process" itself, which ensure that the criminal trial proceeds efficiently and produces reliable results. *Rock* v. *Arkansas*, 483 U.S. 44, 55 (1987). Indeed, this Court has "never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted." *Crane*, 476 U.S. at 690.

As this Court has recognized, the States may take steps to maintain "[t]he integrity of the adversary process" itself. *Taylor* v. *Illinois*, 484 U.S. 400, 414 (1988). The integrity of a criminal trial "depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process." *Id.* at 414-415. In furtherance of these legitimate interests, trial courts "retain wide latitude" to limit the presentation of evidence that will result in "confusion of the issues" or that is "repetitive or only marginally relevant." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986).

Recognizing the importance of these interests, this Court has held that, in the exercise of his right to present a defense, a criminal defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers*, 410 U.S. at 302. For example, a criminal defendant does not have a

constitutional right to present evidence that is "incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Montana* v. *Egelhoff*, 518 U.S. 37, 42 (1996) (plurality opinion). And even otherwise admissible evidence may be excluded as a sanction for the defendant's failure to comply with a valid discovery order. See *Taylor*, 484 U.S. at 414-417; *United States* v. *Nobles*, 422 U.S. 225, 241 (1975). Although the Constitution guarantees a criminal defendant's right to present a defense, it does not guarantee that a jury will hear all of the evidence—or even all of the *relevant* evidence—that he wishes to present. *Egelhoff*, 518 U.S. at 42.

The States have "broad latitude under the Constitution to establish rules excluding evidence from criminal trials," *Scheffer*, 523 U.S. at 308, and this Court will not "engage in a finely tuned review of * * * state evidentiary rules" under the guise of due process analysis. *Lonberger*, 459 U.S. at 438 n.6. Moreover, States may employ differing approaches to evidentiary issues without running afoul of the Constitution. See *Scheffer*, 523 U.S. at 318 (Kennedy, J., concurring). Although the States' prerogatives to regulate the presentation of evidence in criminal trials are not unfettered, petitioner bears a heavy burden to show that the exclusion of third-party-guilt evidence from his trial violated the Constitution. See *Egelhoff*, 518 U.S. at 42-43.

A criminal defendant cannot complain that a State's evidentiary rules violate his constitutional right to present a defense so long as those rules are not "arbitrary or disproportionate to the purposes they are designed to serve." *Rock*, 483 U.S. at 55. Applying this principle, the Court has found that evidentiary rules violated due process only where they mandated exclusion of *entire categories* of evidence, without regard to the particular circumstances of individual cases and without occasion for an exercise of discretion by the trial court.

In *Washington* v. *Texas*, 388 U.S. 14 (1967), for example, this Court reversed a criminal conviction where the trial court excluded a confession from a witness who had previously been convicted of the same offense. *Id.* at 23. Although this proffered testimony "would have been relevant and material," and although it was "vital to the defense," the trial court excluded the testimony because state law provided that persons charged with, or convicted of, the same crime could not testify in each other's behalf. *Id.* at 16. This Court held that, by applying this categorical rule of exclusion, the State "arbitrarily denied [the defendant] the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Id.* at 23.

Similarly, the Court in *Chambers* reversed a criminal conviction where the trial court excluded third-party-guilt evidence on the grounds that (1) a defendant could not impeach his own witness under any circumstance, and (2) out-of-court statements made by a third party were inadmissible hearsay, even if they were statements against penal interest. 410 U.S. at 294-303. The Court rejected the State's argument that the right to confront adverse witnesses through impeachment depended upon the "technicality" of which party had called the witness to testify. *Id.* at 298. Concerning the proffered hearsay testimony, the Court began by noting that the evidence "bore persuasive assurances of trustworthiness" and concluded that "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302. But again, as in *Washington*, the State in *Chambers* had applied categorical rules of exclusion without regard to the particular circumstances of the case or the reliability of the evidence, and without any exercise of the trial court's discretion.

If there were any doubt about the principle that guided the Court in *Chambers*, it would be resolved by the fact that

the Court expressly limited its decision to the particular facts of that case: "[W]e establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial." 410 U.S. at 302-303. See also *Egelhoff*, 518 U.S. at 52-53 (describing *Chambers* as "an exercise in highly case-specific error correction"); *Scheffer*, 523 U.S. at 316 (noting the limitation of *Chambers*). Thus, after *Chambers*, the States remain free to fashion rules requiring exclusion of evidence under certain circumstances, provided they do not simply apply blanket exclusions of an entire class of evidence without regard to its particular relevance under the circumstances of the defendant's case. See *Green* v. *Georgia*, 442 U.S. 95, 97 (1979) (*per curiam*).

This conclusion is confirmed by *Rock* v. *Arkansas*, 483 U.S. 44, 56-62 (1987), where the Court reversed a conviction based upon the trial court's refusal to permit the defendant to testify about facts she recalled only after undergoing hypnosis. Critical to the Court's holding was the fact that "[t]he Arkansas rule enunciated by the state courts does not allow a trial court to consider whether posthypnosis testimony may be admissible in a *particular* case; it is a *per se* rule prohibiting the admission at trial of *any* defendant's hypnotically refreshed testimony on the ground that such testimony is *always* unreliable." *Id.* at 56 (emphasis added). Application of this rule resulted in an *arbitrary* denial of the defendant's right to present a defense, since the rule "operate[d] to the detriment of *any* defendant who undergoes hypnosis, *without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced.*" *Ibid.* (emphasis added).

The Court in *Rock* acknowledged the "State's legitimate interest in barring unreliable evidence" from a criminal trial, but concluded that this interest "does not extend to *per se* exclusions [of evidence] that may be reliable in an individual case. Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections." 483 U.S. at 61.

Taken together, *Washington*, *Chambers*, and *Rock* confirm that due process is satisfied where the admission of evidence proffered by the defendant depends on the court's exercise of individualized discretion in the context of the trial, not on categorical assumptions about the reliability of certain kinds of evidence. *Cf. Taylor*, 484 U.S. at 417 (approving the trial court's discretionary exclusion of evidence as a discovery sanction).[2] This principle reflects the Court's consistent view that the hallmark of due process is a meaningful opportunity to be heard on the specific circumstances of an individual case. *E.g.*, *Deck* v. *Missouri*, 125 S. Ct. 2007, 2014 (2005) (holding that "due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case"); *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 644 (1974) (holding that due process does not allow mandatory leave rules requiring termination of teachers in their fifth and sixth months of pregnancy, because "[t]here is no individualized determination by the teacher's doctor—or the school board's—as to any particular teacher's ability to continue at her job").

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[2] This Court has even invalidated a categorical rule *forbidding exclusion* of certain evidence. See *Michigan* v. *Lucas*, 500 U.S. 145, 151-153 (1991) (holding that that "[t]he Sixth Amendment is not so rigid" as to forbid exclusion of evidence as a sanction for a defendant's violation of a legitimate procedural rule).

South Carolina's requirement that third-party-guilt evidence must raise a reasonable inference of the defendant's innocence is fully consistent with these decisions. Determining whether the defendant's proffered evidence is sufficiently probative to raise such an inference is necessarily a fact-specific exercise, and the determination helps ensure the integrity of the trial process. Moreover, as explained above, the court below conducted an individualized analysis in determining whether to admit the evidence proffered by the petitioner here. Due process requires nothing more.

B. South Carolina's rule on third-party-guilt evidence also comports with traditional practice under federal and state law.

South Carolina's rules on admissibility of third-party-guilt evidence are also "reasonable" in that they do not "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson* v. *New York*, 432 U.S. 197, 202 (1977) (quotations omitted).

1. As this Court has emphasized "from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994). "[I]n all due-process cases," moreover, the "Nation's history, legal traditions, and practices * * * provide the crucial guideposts for responsible decisionmaking that direct and restrain our exposition of the Due Process Clause." *Washington* v. *Glucksberg*, 521 U.S. 702, 710, 721 (1997) (quotations and citation omitted).

Where a practice enjoys the support of a large majority of the States and the imprimatur of long experience, this Court has been extremely reluctant to strike it down under the Due Process Clause. *E.g.*, *id.* at 723 ("To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy

choice of almost every State"); *Burnham* v. *Superior Court*, 495 U.S. 604, 615 (1990) (plurality opinion); *Schall* v. *Martin*, 467 U.S. 253, 266-267 (1984). As Justice Holmes expressed the point in *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22 (1922): "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Id.* at 31.

Following this principle, the plurality in *Schad* v. *Arizona*, 501 U.S. 624 (1991), concluded that "historical and contemporary acceptance of Arizona's definition of the offense and verdict practice is a strong indication that they do not 'offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 642. This conclusion reflected the simple fact that "legal definitions, and the practices comporting with them, are unlikely to endure for long, or to retain wide acceptance, if they are at odds with notions of fairness and rationality sufficiently fundamental to be comprehended in due process." *Ibid.* The concurrence in *Schad* accorded even greater weight to historical practice, stating that "it is impossible that a practice as old as the common law and still in existence in the vast majority of States does not provide that process which is 'due.'" 501 U.S. at 651 (Scalia, J., concurring).

2. Under this mode of analysis, petitioner must show that his right to present evidence that does not raise a reasonable inference of the third party's culpability is a "fundamental principle of justice." *Egelhoff*, 518 U.S. at 43. But he cannot make this showing here because the relevant "historical practice" confirms that this Court and many States have excluded such evidence for more than a century. *Ibid.*; see also *Medina* v. *California*, 505 U.S. 437, 446 (1992) ("Historical practice is probative of whether a procedural rule can be characterized as fundamental").

Until *Chambers* was decided in 1973, this Court (and most States) "followed the 19th-century English rule that

categorically refused to recognize any 'against penal interest' exception to the hearsay rule, holding instead that under federal law only hearsay statements against pecuniary (and perhaps proprietary) interest were sufficiently reliable to warrant their admission at the trial of someone other than the declarant." *Lilly* v. *Virginia*, 527 U.S. 116, 129 (1999) (citing *Donnelly* v. *United States*, 228 U.S. 243 (1913)). For example, the Court in *Donnelly* held that a third party's confession to the charged offense was not admissible at the defendant's trial because it was not a statement against pecuniary interest. 228 U.S. at 272-277. Indeed, the Court there observed that "[i]n this country there is a great and practically unanimous weight of authority in the state courts against admitting evidence of confessions of third parties, made out of court, and tending to exonerate the accused." *Id.* at 273.

Thus, for almost the first two hundred years of the Republic, criminal defendants were not entitled to introduce evidence of a third party's out-of-court confession to the charged offense unless that confession constituted a statement against pecuniary interest.

Similarly, it has been the rule in federal criminal trials since at least 1891 that third-party-guilt evidence is not admissible if it is "so remote or insignificant as to have no legitimate tendency to show that [the third party] could have committed" the charged offense. *Alexander* v. *United States*, 138 U.S. 353, 356 (1891). Indeed, as the Court explained in *Alexander*, "it would be the *duty* of the court to exclude the [third-party-guilt] testimony" at issue in that case if "it were clearly proven that the murder was committed before the threats of [the third party] were uttered, or the two occurrences were so remote in time and place as to demonstrate that there could have been no connection between them." *Ibid.* (emphasis added).

Not surprisingly, federal courts have consistently held that third-party-guilt evidence is not admissible unless it

bears a sufficient connection to the specific crime charged. *E.g.*, *Wade* v. *Mantello*, 333 F.3d 51, 57-62 (2d Cir. 2003); *DiBenedetto* v. *Hall*, 272 F.3d 1, 7-9 (1st Cir. 2001); *Guam* v. *Ignacio*, 10 F.3d 608, 615 (9th Cir. 1993); *Glaze* v. *Redman*, 986 F.2d 1192, 1195-1197 (8th Cir. 1993); *Cikora* v. *Dugger*, 840 F.2d 893, 897-898 (11th Cir. 1988); *United States* v. *Cabrerra*, 80 F.3d 558, 1996 WL 135718, at *2-*3 (D.C. Cir. Feb. 15, 1996) (unpublished). For example, the Ninth Circuit has concluded that a district court properly excluded third-party-guilt evidence where that evidence "was not so closely connected to the issue of [the defendant's] guilt or innocence that its exclusion, based on its lack of probity and its tendency to confuse the jury, violated due process or the right of compulsory process." *Perry* v. *Rushen*, 713 F.2d 1447, 1455 (9th Cir. 1983).

In their consideration of third-party-guilt evidence, the States consider both the probative value of the proffered evidence and the likelihood that admission of such evidence would result in confusion of issues, undue delay, and waste of judicial resources.[3] Most States have specific rules to guide their trial courts in this balancing analysis. As shown in the Appendices, most state courts have held that third-party-guilt evidence is not admissible unless it bears such a connection to the charged offense that it suggests the innocence of the accused.[4] Some States require that the

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[3] *E.g.*, *Florida* v. *Savino*, 567 So.2d 892, 894 (Fla. 1990); *Iowa* v. *Wilson*, 406 N.W.2d 442, 447-448 (Iowa 1987); *People* v. *Primo*, 728 N.Y.S.2d 735, 739-740 (N.Y. 2001); *South Dakota* v. *Jenner*, 451 N.W.2d 710, 722 (S.D. 1990).

[4] *E.g.*, *Smithart* v. *Alaska*, 988 P.2d 583, 586 (Alaska 1999); *Shields* v. *Arkansas*, 166 S.W.3d 28, 32 (Ark. 2004); *People* v. *Hall*, 718 P.2d 99, 104 (Cal. 1986) (*en banc*); *People* v. *Mulligan*, 568 P.2d 449, 456 (Colo. 1977); *Connecticut* v. *West*, 877 A.2d 787, 802 (Conn. 2005); *Winfield* v. *United States*, 676 A.2d 1, 4-5 (D.C. 1996) (*en banc*); *Klinect* v. *State*, 501 S.E.2d 810, 813 (Ga. 1998); *Hawaii* v. *Rabellizsa*, 903 P.2d 43, 47 (Haw. 1997); *People* v. *Fort*, 618 N.E.2d 445, 455 (Ill.

proffered evidence point clearly or directly to the third party's guilt.[5] Other States require that the proffered evidence raise a reasonable doubt as to the defendant's guilt,[6] or, put another way, raise a reasonable inference of the defendant's innocence.[7] Indeed, until 1986, California required that the defendant demonstrate a *substantial probability* of the third party's guilt.[8] Despite their variations, these rules share a common purpose—to prevent

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App. Ct. 1993); *Kansas* v. *Adams*, 124 P.3d 19, 28 (Kan. 2005); *Beaty* v. *Kentucky*, 125 S.W.3d 196, 208 (Ky. 2003); *Maine* v. *Dechaine*, 572 A.2d 130, 134 (Me. 1990); *Commonwealth* v. *Scott*, 564 N.E.2d 370, 374 (Mass. 1990); *Minnesota* v. *Jones*, 678 N.W.2d 1, 16-17 (Minn. 2004); *Moore* v. *State*, 175 So. 183, 184 (Miss. 1937); *Missouri* v. *Chaney*, 967 S.W.2d 47, 55 (Mo. 1998) (*en banc*); *New Jersey* v. *Cotto*, 865 A.2d 660, 669-670 (N.J. 2005); *Gore* v. *Oklahoma*, 119 P.3d 1268, 1274 (Okla. Crim. App. 2005); *Pennsylvania* v. *Saksek*, 522 A.2d 70, 71-72 (Pa. Super. Ct. 1987); *State* v. *Mendoza*, 709 A.2d 1030, 1035-1036 (R.I. 1998); *State* v. *Gregory*, 16 S.E.2d 532, 534-535 (S.C. 1941); *Wiley* v. *Texas*, 74 S.W.3d 399, 406 (Tex. Crim. App. 2002); *Vermont* v. *Grega*, 721 A.2d 445, 454 (Vt. 1998); *Washington* v. *Thomas*, 83 P.3d 970, 988 (Wash. 2004) (*en banc*); *West Va. v. Parr*, 534 S.E.2d 23, 29 (W. Va. 2000); *Wisconsin* v. *Denny*, 357 N.W.2d 12, 16 (Wis. Ct. App. 1984).

[5] *E.g.*, *Shields*, 166 S.W.3d at 32 (Arkansas); *Idaho* v. *Larsen*, 415 P.2d 685, 690 (Idaho 1966); *North Carolina* v. *Israel*, 539 S.E.2d 633, 637 (N.C. 2000); *Gore*, 119 P.3d at 1274 (Oklahoma); *Gregory*, 16 S.E.2d at 535 (South Carolina); *Oliva* v. *Virginia*, 452 S.E.2d 877, 880 (Va. Ct. App. 1995); *Matter of Lord*, 868 P.2d 835, 849 (Wash. 1994) (*en banc*).

[6] *E.g.*, *Arizona* v. *Prion*, 52 P.3d 189, 193 (Ariz. 2002) (*en banc*); *Shields*, 166 S.W.3d at 32 (Arkansas); *Hall*, 718 P.2d at 104 (California); *McCullough* v. *United States*, 827 A.2d 48, 55 (D.C. 2003); *Maine* v. *Conlogue*, 474 A.2d 167, 172 (Me. 1984); *New Jersey* v. *Sturdivant*, 155 A.2d 771, 778 (N.J. 1959).

[7] See *Klinect*, 501 S.E.2d at 814 (Georgia); *Gregory*, 16 S.E.2d at 534 (South Carolina).

[8] See *Hall*, 718 P.2d 99, 101 (Cal. 1986); *People* v. *Green*, 609 P.2d 468, 480 (Cal. 1980).

the trial of the accused from degenerating into confusing minitrials of collateral issues that would only cast suspicion upon third parties.[9]

This record of the practice of federal and state courts alike demonstrates that the purported right of a criminal defendant to present third-party-guilt evidence that does not have a legitimate tendency to prove, or cannot raise a reasonable inference of, the defendant's innocence is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 202. These decisions thus further demonstrate that South Carolina's rule is fully consistent with due process.

3. These decisions also directly refute petitioners' assertion that South Carolina's approach to third-party-guilt evidence is somehow "idiosyncratic." Pet. Br. 20. The South Carolina Supreme Court described its rule as follows: "The evidence offered by [the] accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have no other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." *State* v. *Holmes*, 605 S.E.2d 19, 23 (S.C. 2004). The court adopted these standards *verbatim* from *Corpus Juris* and *American Jurisprudence* more than sixty years ago. See *Gregory*, 16 S.E.2d at 534-535.

South Carolina's requirement—that a defendant's proffered evidence suggest the third party's sole culpability in the charged offense to such a degree that a juror reasonably could doubt the defendant's guilt—was not

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[9] See, *e.g.*, *Smithart*, 988 P.2d at 586-587; *Larsen*, 415 P.2d at 690; *Wilson*, 406 N.W.2d at 448; *Dechaine*, 572 A.2d at 134; *Oliva*, 452 S.E.2d at 880; *Denny*, 357 N.W.2d at 17.

unique in 1941, and it is not unique today. Indeed, the same authorities that South Carolina relied upon in adopting its rule in 1941 contain similar formulations of the standard rule concerning third-party-guilt today. See 41 C.J.S. *Homicide* § 216, at 56-58 (1991); 40A Am. Jur. 2d *Homicide* § 286, at 136-138 (1999).

Nor does the state court's consideration of the strength of the evidence in *the State's* case render the application of its rule on third-party-guilt evidence "idiosyncratic." As a distinguished panel of the D.C. Circuit (Edwards, C.J., Wald, Henderson) has explained, in determining whether to admit "evidence inculpating a third party," courts should consider "the *relative* strength of the evidence that the third party committed the crime *compared with the evidence that the defendant committed the crime.*" *Cabrerra*, 1996 WL 135718, at *2 (emphasis added); accord *Glaze*, 986 F.2d at 1196-1197 (finding no due process violation *"[i]n view of the evidence of guilt*, the lack of reliability of the excluded evidence and the conduct of the entire trial").

Just last month, the Supreme Court of Kansas rejected a defendant's claim that the exclusion of certain third-party-guilt evidence violated his due process rights, noting that "[t]he State had a wealth of evidence against [the defendant], both direct and circumstantial" and that "[w]ithout competing evidence on the mechanism and timing of the fatal injuries, [the defendant's] effort to pin blame on [the third party] amounted to baseless innuendo." *Adams*, 124 P.3d at 29.

Similarly, the California Court of Appeal has held that a trial court properly excluded third-party-guilt evidence where "the prosecutor's offer of proof—that the [third party's] fingerprints proved that he could not have been the intruder—was 'too strong' to overcome." *People* v. *Johnson*, 200 Cal. App. 3d 1553, 1564 (Cal. Ct. App. 1988). Specifically rejecting the defendant's charge that the trial court had improperly invaded the province of the jury, the court

concluded that the trial court's assessment of the totality of the evidence was appropriate. "Simply put," the court concluded, "[the defendant] raised a possibility that the prosecution's evidence made an impossibility. As his proffered evidence could not logically raise a reasonable doubt about his guilt, the trial court properly excluded it." *Ibid.*

In sum, the decision below was a fact-specific application of a reasonable restriction on the admissibility of third-party-guilt evidence. Exclusion of petitioner's proffered evidence promoted the truth-finding function of the trial by focusing the jury's attention on evidence that bore directly on petitioner's conduct and insulating the jury from speculative accusations against Jimmy White and police investigators.

II. Requiring Defendants To Make An Initial Showing That Their Proffered Evidence Raises A Reasonable Inference Of Innocence Does Not Violate The Right To A Jury Trial.

Requiring a criminal defendant to demonstrate that his third-party-guilt evidence raises an inference of his innocence also does not violate his Sixth Amendment right to a jury trial. Questions of admissibility are for courts, not juries, and courts routinely make determinations of admissibility based on whether the proponent has established a proper foundation. The right to a jury trial has never included the right to have juries determine whether proffered evidence is properly admissible.

A. Under this Court's decisions, courts properly exclude evidence where defendants fail to establish, by a preponderance of the evidence, the facts upon which admissibility depends.

This Court has long recognized the "normal rule that the admissibility of evidence is a question for the court rather than the jury." *Lego* v. *Twomey*, 404 U.S. 477, 490 (1972);

accord *Gila Valley, Globe, & N. Ry. Co.* v. *Hall*, 232 U.S. 94, 103 (1914) ("Questions of the admissibility of evidence are for the determination of the court; and this is so whether its admission depend upon matter of law or upon matter of fact"). Thus, cases involving the constitutionality of admitting or excluding evidence at trial have focused on the trial court's role in determining the admissibility of evidence. *E.g.*, *Old Chief* v. *United States*, 519 U.S. 172, 180 (1997) (addressing the trial court's discretion to exclude evidence under Fed. R. Evid. 403); *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993) (describing the trial court's gatekeeping function in cases involving expert opinion testimony); *Bourjaily* v. *United States*, 483 U.S. 171, 175 (1987) (defining the standard of proof for facts necessary to the trial court's determination whether a hearsay exception applies). As the Court has explained, "[e]vidence is placed before the jury when it satisfies the technical requirements of the evidentiary [r]ules, which embody certain legal and policy determinations." *Bourjaily*, 483 U.S. at 175.

1. Determining whether proffered evidence satisfies these rules is the task of the trial court, and the question decidedly is not "whether the proponent of the evidence wins or loses his case on the merits." *Ibid.* Because "the evidentiary standard is unrelated to the burden of proof on the substantive issues" (*ibid.*), an evidentiary rule requiring that third-party-guilt evidence suggest an inference of the defendant's innocence does not run afoul of *In re Winship*, 397 U.S. 358 (1970). As this Court has noted, "*Winship* went no further than to confirm the fundamental right that protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Lego*, 404 U.S. at 486 (quotations omitted). In short, *Winship* "was not concerned with standards for determining the admissibility of evidence." *Id.* at 486.

The Federal Rules of Evidence, proposed by this Court, reflect the same reasoning. Rule 104(a) states that "preliminary questions concerning *** the admissibility of evidence shall be determined by the court." In making this determination, the court is not bound by the rules of evidence, see Fed. R. Evid. 104(a), and it need only find the preliminary fact by a *preponderance* of the evidence. See *Bourjaily*, 483 U.S. at 176 ("when the preliminary facts relevant to Rule 801(d)(2)(E) are disputed, the offering party must prove them by a preponderance of the evidence").

The same is true in cases involving so-called conditional relevance under Fed. R. Evid. 104(b). Where the relevance of evidence depends upon the fulfillment of a factual condition, the court "shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Fed. R. Evid. 104(b). In determining whether such a condition has been fulfilled, a trial court "simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact *** by a preponderance of the evidence." *Huddleston* v. *United States*, 485 U.S. 681, 690 (1988).

Thus, even in criminal cases, it is not unusual for courts to make determinations of admissibility based on facts established by a preponderance of evidence. For example, the Court in *Lego* concluded that a trial court should "admit into evidence only those confessions that he reliably found, *at least by a preponderance of the evidence*, had been made voluntarily." 404 U.S. at 484-487 (emphasis added). And the Court in *Colorado* v. *Connelly*, 479 U.S. 157 (1986), held that "[w]henever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our *Miranda* doctrine, the State need prove waiver *only by a preponderance of the evidence*." *Id.* at 168 (emphasis added). These decisions demonstrate that the Court has not thought it inappropriate, or unconstitutional, for trial courts to make preliminary

findings in determining the admissibility of proffered evidence.[10]

2. The fact that the court below considered the State's evidence of guilt in determining whether petitioner's evidence raised such an inference does not create any Sixth Amendment problem. Indeed, this Court has instructed trial courts to consider all the facts and circumstances of a case when making preliminary findings concerning admissibility of evidence. See *Huddleston*, 485 U.S. at 690. And, as noted above, the D.C. Circuit has ruled in this very context that an important factor to consider in determining whether "evidence inculpating a third party" should be admitted is "the *relative strength* of the evidence that the third party committed the crime *compared with* the evidence that the defendant committed the crime." *Cabrerra*, 1996 WL

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[10] Indeed, federal courts routinely make such findings in determining whether character evidence is admissible under Fed. R. Evid. 404(b) and whether out-of-court statements are admissible under exceptions to the hearsay rule. See generally 21A Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure: Evidence 2d* § 5053.3 (2005). For example, several courts of appeals have held that a district court considering application of Fed. R. Evid. 804(b)(6)—which allows admission of hearsay statements where the defendant procured the unavailability of the declarant—need only find that the defendant was responsible for the declarant's unavailability by a preponderance of the evidence. See *United States* v. *Gray*, 405 F.3d 227, 241 (4th Cir. 2005); *United States* v. *Scott*, 284 F.3d 758, 762 (7th Cir. 2002); *United States* v. *Zlatogur*, 271 F.3d 1025, 1028 (11th Cir. 2001); *United States* v. *Dhinsa*, 243 F.3d 635, 653-6654 (2d Cir. 2001); *United States* v. *Emery*, 186 F.3d 921, 926-927 (8th Cir. 1999); *United States* v. *White*, 116 F.3d 903, 912 (D.C. Cir. 1997); *United States* v. *Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996). Thus, even in murder trials where the victim is the unavailable declarant, the Government may introduce the victim's hearsay statements if the court finds by a preponderance of the evidence that the defendant committed the murder. See *Gray*, 405 F.3d at 240-243.

135718, at *2; accord *Glaze*, 986 F.2d at 1196-1197; *Adams*, 124 P.3d at 29; *Johnson*, 200 Cal. App. 3d at 1564.

Both this Court's prior decisions and the Federal Rules of Evidence that it has proposed demonstrate that there is nothing unusual—and certainly nothing unconstitutional—about a trial court's determining admissibility based on facts proved by a preponderance of evidence. Yet here, South Carolina did not even require petitioner to make that much of a showing. Rather, it merely required him to show that his evidence raised some reasonable *inference* of his innocence in light of all the circumstances of the case. Requiring a reasonable inference of innocence is not at all the same as requiring convincing evidence of innocence. Thus, it simply is not true, as *amici* law professors assert, that South Carolina "permits a court to exclude an entire category of evidence of the defendant's innocence because the court is convinced of his guilt." Br. *Amicus Curiae* of Forty Professors of Evidence Law 15.

Petitioner would have a stronger argument had the court below assessed the credibility of witnesses and made its own determination of guilt. But it did not. Instead, it considered the facts that Jimmy White *denied* making any confession to the crime and that the FBI forensic examiner *excluded* White as a possible perpetrator, concluding that petitioner's evidence was not sufficiently probative to raise a reasonable inference of his own innocence. Admission of petitioner's evidence would have derailed the trial and diverted the jury's attention to issues about White's credibility and the validity of the FBI examiner's forensic tests.

B. South Carolina's approach to third-party-guilt evidence comports with the history of the Sixth Amendment.

The decision below—and South Carolina's approach to the admission of third-party-guilt evidence—is also

consistent with the history of the Sixth Amendment right to a jury trial, which has never included the right to have the jury decide questions of admissibility. More than a century ago, this Court affirmed the fundamental principle that judges decide questions of law, while juries decide questions of fact based on the law they receive from the court. See *Sparf* v. *United States*, 156 U.S. 51, 106 (1895). After canvassing English and early American authorities on the subject, the Court concluded that "the chief value, as well as safety, of the jury system" was the traditional "separation of the functions of court and jury." *Ibid.* See also 1 Wigmore on Evidence § 12, at 693 (Tillers rev. 1983) (noting that "in our system, the tribunal has traditionally been a divided one, so that the rule of law, uttered by the judge, merely declares what is sufficient to go to the jury and the jury ultimately decides upon the total effect of what we call proof").

The historical evidence supporting this conclusion included statements from leading American jurists and commentators recognizing the role of the trial court in determining the admissibility of evidence. For example, the Court recited Justice Curtis's statement in *United States* v. *Morris* that "it is the duty of the court to decide every question of law which arises in a criminal trial; if the question touches any matter affecting the course of the trial, such as the competency of a witness, *the admissibility of evidence*, and the like, *the jury receive no direction concerning it; it affects the materials out of which they are to form their verdict, but they have no more concern with it than they would have had if the question had arisen in some other trial.*" 156 U.S. at 75 (emphasis added).

To like effect was Forsyth's *History of Trial By Jury*, which the Court described as "a work of merit," and which noted that "the judge has his peculiar duty in the conduct of a trial. He must determine whether the kind of evidence offered is such as ought or ought not to be submitted to the

jury." *Id.* at 88. Similarly, Justice Wilson had stated in one of his famous lectures that "[o]n questions of law, [the juror's] deficiencies will be supplied by the professional directions of the judges * * * . Questions of fact it is his exclusive province to determine. *With the consideration of evidence unconnected with the question which he is to try, his attention will not be distracted; for everything of that nature, we presume will be excluded by the court.*" *Id.* at 69 (emphasis added; quotations omitted).

Based on these authorities, the Court in *Sparf* stated unequivocally that the admissibility of evidence in a criminal trial is a question for the court, not the jury. See also *Gila Valley*, 232 U.S. at 103 ("Questions of the admissibility of evidence are for the determination of the court; and this is so whether its admission depend upon matter of law or upon matter of fact").

The Court's position in *Sparf* is consistent with the view of a leading commentator on the law of evidence in the late nineteenth century. According to Professor Thayer, "there is not, and never was, any such thing in jury trials as an allotting of all questions of fact to the jury. The jury simply decides some questions of fact. The maxim ["the judges do not answer the question of fact, the jurors do not answer the question of law"] was never true, if taken absolutely. * * * [I]t relates only to issues of fact, and not to the incidental questions that spring up before the parties are at issue, and before the trial; and so of many of those which present themselves during the trial. The maxim has nothing to do with matters of evidence, but only with a limited class of questions of fact; namely, questions raised by the pleadings, questions of ultimate fact." James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 185-187 (1898).

Later, even as the Court applied to the States various Sixth Amendment guarantees—including the jury trial guarantee—the Court was careful not to upset this basic

separation of functions between judge and jury. Thus, the Court in *Lego* remarked that "*Duncan* v. *Louisiana*, which made the Sixth Amendment right to trial by jury applicable to the States, did not purport to change the normal rule that the admissibility of evidence is a question for the court rather than the jury." 404 U.S. at 490 (citation omitted).

No doubt because of this fundamental proposition – that trial courts are solely responsible for decisions on admissibility of evidence – this Court has never held that the Sixth Amendment right to a jury trial requires that the jury determine whether proffered evidence, even exculpatory evidence, should be received into evidence. To the contrary, the Court has repeatedly addressed constitutional issues about the admission or exclusion of evidence in terms of the scope of the trial court's discretion. *E.g.*, *Old Chief*, 519 U.S. at 180; *Daubert*, 509 U.S. at 589; *Bourjaily*, 483 U.S. at 175. It is hardly surprising, then, that the Court has found the rule of *Winship* wholly inapplicable to questions concerning admissibility of evidence. *Lego*, 404 U.S. at 487. For the same reason, there is no Sixth Amendment violation here.

III. Even If Exclusion of Third-Party-Guilt Evidence In This Case Were Erroneous, Any Such Error Would Be Subject to Harmless-Error Analysis.

Even if the Court were to conclude that South Carolina's application of its rules on third-party-guilt evidence was erroneous in this case, any such error would be subject to harmless-error analysis. This Court has often reaffirmed that "a constitutional error does not automatically require reversal of a conviction." *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991). Indeed, "*most* constitutional errors can be harmless." *Ibid.* (emphasis added). Moreover, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose* v. *Clark*, 478 U.S. 570, 579 (1986). This presumption follows from the premise that the Constitution

entitles a criminal defendant to a trial that is fair, not perfect. *Van Arsdall*, 475 U.S. at 681.

As this Court noted in *Fulminante*, the "common thread" among the cases in which the Court has applied harmless-error analysis is that "each involved 'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." 499 U.S. at 307-308. Such "trial errors" are distinguished from "structural defects in the constitution of the trial mechanism"—errors that "affect[] the framework within which the trial proceeds." *Id.* at 309-310. Structural errors include errors such as deprivation of the right to counsel at trial, participation of a biased judge, and improper exclusion of members of the defendant's race from a grand jury. *Ibid.*

The error alleged in this case is a "trial error" subject to harmless-error analysis. Like other Sixth Amendment violations, the alleged error here concerned the presentation of evidence to the jury and did not affect the structural framework within which the trial occurred. *Cf. Satterwhite* v. *Texas*, 486 U.S. 249, 258 (1988) (admission of evidence in violation of the defendant's right to counsel); *Van Arsdall*, 475 U.S. at 684 (limitation on cross-examination in violation of the defendant's right to confront witnesses); *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977) (admission of identification evidence in violation of the defendant's right to counsel). Indeed, this Court has already recognized that a trial court's exclusion of evidence in violation of the defendant's right to present a complete defense is subject to harmless-error analysis. See *Crane*, 476 U.S. at 691. As we explain below, the Court should reach the same conclusion here.

A fair examination of the record in this case reveals that any error in excluding petitioner's third-party-guilt evidence, if it was error at all, was "harmless beyond a

reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24 (1967). As the Court stated in *Rose*, a judgment of conviction should be affirmed "[w]here a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt." 478 U.S. at 579.

The court below detailed the overwhelming evidence pointing to petitioner—and petitioner alone—as the guilty party. The evidence before the jury showed that: (1) a police officer saw petitioner in the victim's neighborhood just 45 minutes before the attack; (2) petitioner matched the victim's description of her attacker; (3) although petitioner told the police he had never been inside the victim's apartment, his palm print was found on the inside of her front door; (4) fibers consistent with petitioner's sweatshirt and jeans were found on the victim's bed sheets and nightgown; (5) fibers consistent with the victim's nightgown were found on petitioner's underwear; (6) petitioner's tank top contained a mixture of his blood and the victim's blood, and (7) petitioner's underwear contained a mixture of DNA from two people, and forensic examination had excluded as the sources of this DNA 99.99% of the population other than petitioner and the victim. *Holmes*, 605 S.E.2d at 21-22. At the same time, the State proffered evidence from a forensic examiner that *excluded* the third party, Jimmy White, as a possible perpetrator. *Id.* at 24.

This evidence would provide an ample basis for the Court to conclude that any error in the exclusion of petitioner's third-party-guilt evidence—if the Court believes it was error—was harmless beyond a reasonable doubt. The Court should affirm the decision below on that ground if it finds it necessary to reach the issue.

CONCLUSION

The decision of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted.

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directly to the guilt of the third party. Evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible. This rule does not require that any evidence, however remote, must be admitted to show a third party's possible culpability; evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt. There must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." *Shields* v. *Arkansas*, 166 S.W.3d 28, 32 (Ark. 2004) (citations omitted).

CALIFORNIA

"To be admissible, the third-party evidence need not show substantial proof of a probability that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability.*** [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." *People* v. *Hall*, 718 P.2d 99, 104 (Cal. 1986) (*en banc*) (quotations omitted).

"A criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his or her own guilt. *** Once the defendant's evidence has been found to raise a reasonable doubt, it may only be excluded if it is more prejudicial than probative." *People* v. *Johnson*, 200 Cal. App. 3d 1553, 1563 (Cal. Ct. App. 1988).

COLORADO

"Evidence that another person had an opportunity or motive for committing the crime for which the defendant is being tried is not admissible without proof that such other person committed some act directly connecting him with the crime." *People* v. *Mulligan*, 568 P.2d 449, 456 (Colo. 1977).

"A defendant may introduce evidence implicating another person in the crime charged. The culpability of another person is usually inferred from evidence of such person's motive or opportunity to commit the crime. To present evidence of opportunity or motive, a defendant must first establish that the other person committed some act directly connecting that person with the crime charged." *People* v. *Owens*, 97 P.3d 227, 235 (Colo. Ct. App. 2004) (citations omitted).

CONNECTICUT

"Ordinarily, evidence concerning a third party's involvement is not admissible until there is some evidence which *directly connects* that third party with the crime. The defendant can always show that some other person and not the defendant committed the crime; however, it is within the sound discretion of the trial court to refuse to admit such evidence when it simply affords a possible ground of possible suspicion against another person." *Connecticut* v. *Payne*, 591 A.2d 1246, 1259 (Conn. 1991) (quotations and citations omitted); *Connecticut* v. *Giguere*, 439 A.2d 1040, 1043 (Conn. 1981).

"We have recognized consistently that a defendant has a right to introduce evidence that indicates that someone other than the defendant committed the crime with which the defendant has been charged. *** The defendant must, however, present evidence that directly connects a third party to the crime ***. It is not enough to show that

another had the motive to commit the crime * * * nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused." *Connecticut* v. *West*, 877 A.2d 787, 802 (Conn. 2005) (quotations omitted).

DELAWARE

Research revealed no reported decision addressing this issue specifically.

DISTRICT OF COLUMBIA

"[T]he evidence must establish proof of facts or circumstances which tend to indicate some reasonable possibility that a person other than the defendant committed the charged offense. The focus of the standard is not on the third party's guilt or innocence, but on the effect the evidence has upon the defendant's culpability, and in this regard it need only tend to create a reasonable doubt that the defendant committed the offense. However, the trial court should still exclude evidence that is too speculative with respect to the third party's guilt." *McCullough* v. *United States*, 827 A.2d 48, 55 (D.C. 2003) (quotations and citations omitted).

"[The court in *Johnson* v. *United States*, 552 A.2d 513 (D.C. 1989) explained that] there must be proof of facts or circumstances which tend to indicate some reasonable possibility that a person other than the defendant committed the charged offense. * * * Sitting *en banc*, we now adopt the reasonable possibility formulation of *Johnson* and its conclusion that relevance here means what it generally does in the criminal context, requiring a link, connection or nexus between the proffered evidence and the crime at issue. * * * [The *Johnson* standard] insures the exclusion of evidence that is too remote in time and place, completely

unrelated or irrelevant to the offense charged, or too speculative with respect to the third party's guilt." *Winfield* v. *United States*, 676 A.2d 1, 4-5 (D.C. 1996) (*en banc*) (quotations and citation omitted).

FLORIDA

"[W]here evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission. However, the admissibility of this evidence must be gauged by the same principle of relevancy as any other evidence offered by the defendant." *Rivera* v. *Florida*, 561 So. 2d 536, 539 (Fla. 1990).

"When the purported relevancy of past crimes is to identify the perpetrator of the crime being tried, we have required a close similarity of facts, a unique or 'fingerprint' type of information, for the evidence to be relevant. If a defendant's purpose is to shift suspicion from himself to another person, evidence of past criminal conduct of that other person should be of such nature that it would be admissible if that person were on trial for the present offense. * * * Relevance and weighing the probative value of the evidence against the possible prejudicial effect are the determinative factors governing the admissibility of similar-fact evidence of other crimes when offered by the state. These same factors should apply when the defendant offers such evidence." *Florida* v. *Savino*, 567 So. 2d 892, 894 (Fla. 1990) (citations omitted).

GEORGIA

"Certainly a defendant is entitled to introduce relevant and admissible testimony tending to show that another person committed the crime for which the defendant is tried. However, the proffered evidence must raise a reasonable inference of the defendant's innocence, and must directly connect the other person with the corpus delicti, or show

that the other person has recently committed a crime of the same or similar nature." *Klinect* v. *State*, 501 S.E.2d 810, 813-814 (Ga. 1998) (citations omitted); *Allen* v. *State*, 561 S.E.2d 397, 402 (Ga. 2002).

HAWAII

"We are persuaded that the 'legitimate tendency' test comports with the relevancy test set forth in HRE Rule 401, instructing that 'relevant evidence means evidence having any tendency to make the existence of any fact * * * more or less probable. It is clear that there must be some evidence linking the third person to the crime in order to admit evidence of the third person's motive." *Hawaii* v. *Rabellizsa*, 903 P.2d 43, 47 (Haw. 1995).

IDAHO

"It is permissible for an accused to show that another might have committed the crime for which the accused is on trial. However: It is well established that before such testimony can be received, there must be such proof of connection with the crime, such a train of facts or circumstances, as tend clearly to point out someone besides the accused as the guilty party. Remote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose. A defendant in a criminal trial is not: * * * permitted by way of defense to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that some one other than he is more probably guilty." *Idaho* v. *Larsen*, 415 P.2d 685, 690 (Idaho 1966) (quotations and citations omitted).

ILLINOIS

"Although a defendant in a criminal case may offer evidence that tends to show that someone else committed the offense with which he is charged, such evidence should be excluded on the basis that it is irrelevant if it is too remote or too speculative." *People* v. *Kirchner*, 743 N.E.2d 94, 114 (Ill. 2000).

"It is well settled that an accused may attempt to prove that someone else committed the crime with which he is charged. However, if the evidence is too remote or too speculative, or if it fails to link a third person with the commission of the crime, then the trial court should exclude the evidence." *People* v. *Fort*, 618 N.E.2d 445, 455 (Ill. App. Ct. 1993) (citation omitted).

INDIANA

"The State urges that we apply the standard set forth in *Burdine* v. *State*, 515 N.E.2d 1085 (Ind. 1987), regarding the relevancy, and thus admissibility, of evidence that a person other than the defendant committed the crime. Such evidence 'must do more than cast suspicion or raise a conjectural inference that a third party committed the crime; it must directly connect the third party to the crime charged.' Rather, our review is guided by the Indiana Rules of Evidence ***. Evidence is relevant when it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' Evidence which tends to show that someone else committed the crime logically makes it less probable that the defendant committed the crime, and thus meets the definition of relevance in Rule 401." *Joyner* v. *Indiana*, 678 N.E.2d 386, 389-390 (Ind. 1997) (citations omitted).

IOWA

"Evidence offered by a defendant tending to incriminate another must be confined to substantive facts and create more than a mere suspicion that such other person committed the offense. The defendant's attempt to show that some unknown person may have had a motive to murder Smith, other than an intent to rob him, falls short of creating even a mere suspicion and, indeed, is based on a highly speculative premise.

* * * The evidence has little or no probative value, but would be highly prejudicial to the State if admitted. The jury could be led to conclude that Smith was killed by someone who believed he had molested children, or that Smith's life-style was so generally reprehensible he deserved to die. The potential for improper consideration of the evidence substantially outweighs any probative value it might have.

Furthermore, had the defendant prevailed in his resistance to the motion in limine, this trial rapidly could have disintegrated into two trials, the second issue being whether the deceased was in fact a child molester or pedophile. Admission of the evidence would confuse the issues and mislead the jury. The district court could properly consider these matters in concluding that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *Iowa* v. *Wilson*, 406 N.W.2d 442, 447-448 (Iowa 1987).

KANSAS

"We made clear [in *Kansas* v. *Marsh*, 102 P.3d 445 (Kan. 2004)] that admission of third-party evidence did not turn on the sometimes hazy distinction between direct and circumstantial evidence. Rather, we said, a district judge must evaluate the totality of facts and circumstances in a given case to determine whether the defense's proffered

evidence effectively connects the third party to the crime charged. In addition, we said, '[W]hile evidence of the motive of a third party to commit the crime, standing alone, is not relevant, such evidence may be relevant if there is other evidence connecting the third party to the crime.'

* * *

The State had a wealth of evidence against [the defendant], both direct and circumstantial. He confessed to the crime, demonstrating for law enforcement how he threw [the victim] down and shook her. Expert medical testimony established that [the victim's injuries] occurred approximately 10 to 14 hours before she was declared dead and that the injuries would have made her unconscious immediately. [The defendant] was with her in the relevant time period, while [the third party] was not. * * *

Neither of the pieces of evidence [the defendant] proffered could place [the third party] at the crime scene * * * and thus link her to [the victim's] fatal injuries. * * * Defendant's theory of the case lacked a critical element—medical evidence that injuries inflicted at a time when [the third party] was with [the victim] could have caused [the victim's] death. Without competing evidence on the mechanism and timing of the fatal injuries, [the defendant's] effort to pin blame on [the third party] amounted to baseless innuendo. In such a situation, the district judge's decision to exclude the [third-party-guilt evidence] did not qualify as an abuse of discretion." *Kansas* v. *Adams*, 124 P.3d 19, 28-29 (Kan. 2005) (quotations and citation omitted).

KENTUCKY

"[E]vidence is not automatically admissible simply because it tends to show that someone else committed the offense. For example, evidence of motive alone is insufficient to guarantee admissibility. In a homicide case, a defendant is

not entitled to parade before the jury every person who bore some dislike for the victim without showing that the [alleged alternative perpetrators] at least had an opportunity to commit the murder. *** In the same way, evidence of opportunity alone is insufficient to guarantee admissibility. Simply showing that the [alleged alternative perpetrator] was at the scene of the crime, without also showing some connection between the [alleged alternative perpetrator] and the crime, will generally not be allowed." *Beaty* v. *Kentucky*, 125 S.W.3d 196, 208 (Ky. 2003) (citations omitted).

LOUISIANA

Research revealed no reported decision addressing this issue specifically.

MAINE

"We have previously recognized the right of a criminal defendant in appropriate circumstances *** to introduce evidence to show that another person committed the crime or had the motive, intent, and opportunity to commit it. The trial court also has discretion to exclude such evidence if it is too speculative or conjectural or too disconnected from the facts of the case against the defendant. In other words, evidence tending to implicate another person, and deflect guilt from the defendant, must be admitted if it is of sufficient probative value to raise a reasonable doubt as to the defendant's culpability." *Maine* v. *Conlogue*, 474 A.2d 167, 172 (Me. 1984) (quotations and citations omitted).

"For alternative perpetrator evidence to have sufficient probative value to raise a reasonable doubt as to the defendant's culpability, it must be more than speculative and conjectural. The evidence incriminating another person must be competent and confined to substantive facts which create more than a mere suspicion that the other person

committed the crime. *** The connection between the alternative perpetrator and the crime must be reasonably established by the admissible evidence the defendant is prepared to offer. Without such evidence, a defendant cannot be allowed to use his trial to conduct an investigation that he hopes will convert what amounts to speculation into a connection between the other person and the crime." *Maine* v. *Dechaine*, 572 A.2d 130, 134 (Me. 1990) (quotations and citations omitted).

MARYLAND

Research revealed no reported decision addressing this issue specifically.

MASSACHUSETTS

"It is well established that a defendant should be allowed to introduce evidence that another person recently committed a similar crime by similar methods, since such evidence tends to show that someone other than the accused committed the particular crime. We have stated previously that evidence involving crimes of a similar nature by a person other than the defendant must be admitted when the acts of such other person are so closely connected in point of time and method of operation as to cast doubt upon the identification of the defendant as the person who committed the crime." *Commonwealth* v. *Scott*, 564 N.E.2d 370, 374 (Mass. 1990) (quotations and citations omitted).

MICHIGAN

Research revealed no reported decision addressing this issue specifically.

MINNESOTA

"Alternative perpetrator evidence is admissible if it has an inherent tendency to connect the alternative party with the commission of the crime. Our requirement that such evidence have an inherent tendency to connect the other party with the crime avoids the use of bare suspicion and safeguards the third person from indiscriminate use of past differences with the deceased. Once a foundation is laid with evidence having an inherent tendency to connect the alleged alternative perpetrator to the commission of the crime, it is permissible to introduce evidence of a motive of the third person to commit the crime, threats by the third person, or other miscellaneous facts which would tend to prove the third person committed the act, in order to cast a reasonable doubt on the state's case. " *Minnesota* v. *Jones*, 678 N.W.2d 1, 16-17 (Minn. 2004) (quotations and citations omitted).

"That defendants should be afforded leeway in the admission of other-crimes evidence, however, does not mean that the defendant should be allowed to throw strands of speculation on the wall and see if any of them will stick. At the preliminary fact stage, to avoid the consideration of matters collateral to the crime, the trial court must be satisfied that there is a direct connection between the third party and the charged crime ***. Certainly matters of credibility and inference are for the jury; but in determining preliminary questions of fact in the admissibility of evidence, the trial court need not disregard the evidence already admitted." *Minnesota* v. *Richardson*, 670 N.W.2d 267, 280 (Minn. 2003).

MISSISSIPPI

"It has been said that evidence incriminating another must relate to the res gestae, or directly connect the other person with the corpus delicti. In any event, before such testimony

can be received, there must be such proof of connection with the crime or such a train of facts or circumstances as tends to point out someone other than the accused as the guilty party. Remote acts, disconnected from and outside of the crime itself, cannot be separately proved for such a purpose." *Moore* v. *State*, 175 So. 183, 184 (Miss. 1937).

MISSOURI

"Evidence that another person had an opportunity or motive for committing the crime for which the defendant is being tried is not admissible without proof that such other person committed some act directly connecting him with the crime." *Missouri* v. *Chaney*, 967 S.W.2d 47, 55 (Mo. 1998) (*en banc*).

"A criminal defendant may not introduce evidence that another person had an opportunity or motive to commit the crime charged without proof that the other person committed some act directly connecting him with the crime." *Missouri* v. *Wise*, 879 S.W.2d 494, 510 (Mo. 1994) (*en banc*) (quotations omitted).

MONTANA

Research revealed no reported decision addressing this issue specifically.

NEBRASKA

Research revealed no reported decision addressing this issue specifically.

aggressive life it might easily be possible for the defendant to produce evidence tending to show that hundreds of other persons were possible suspects in the murder. In such a system, the resulting trial would be a confusing waste of judicial resources. The concerns voiced in *Marrone* have led virtually every state to require some kind of preliminary evidentiary showing before allowing introduction of alternative-perpetrator evidence." *Smithart* v. *Alaska*, 988 P.2d 583, 586-587 (Alaska 1999) (quotations and citations omitted).

"[U]nder the *Smithart-Marrone* rule, evidence of another person's motive to commit the crime, or evidence of another person's opportunity to commit the crime, standing alone, will not be admissible when offered to prove that this other person may have committed the crime." *Cleveland* v. *Alaska*, 91 P.3d 965, 972 (Alaska Ct. App. 2004).

ARIZONA

"It is permissible for a defendant to attempt to show that another person committed the crime for which he is charged, but it remains in the trial court's discretion to exclude the evidence if it offers only a possible ground of suspicion against another. * * * We explained in [*Arizona* v. *Gibson*, 44 P.3d 1001 (Ariz. 2002)] that the proper focus in determining relevancy is the effect the evidence has upon the defendant's culpability. To be relevant, the evidence need only tend to create a reasonable doubt as to the defendant's guilt." *Arizona* v. *Prion*, 52 P.3d 189, 193 (Ariz. 2002) (*en banc*) (quotations and citations omitted).

ARKANSAS

"[A] defendant may introduce evidence tending to show that someone other than the defendant committed the crime charged, but such evidence is inadmissible unless it points

APPENDIX B

INDIVIDUAL STATE STANDARDS ADDRESSING THIRD-PARTY-GUILT EVIDENCE

ALABAMA

"It is generally agreed that the defense, in disproving the accused's own guilt, may prove that another person committed the crime for which the accused is being prosecuted. * * * The task of determining the weight that must be possessed by such evidence of another's guilt is a difficult one. To remove this difficulty, this Court has set out a test intended to ensure that any evidence offered for this purpose is admissible only when it is probative and not merely speculative. Three elements must exist before this evidence can be ruled admissible: (1) the evidence must relate to the res gestae of the crime; (2) the evidence must exclude the accused as a perpetrator of the offense; and (3) the evidence would have to be admissible if the third party was on trial." *Ex parte Hall*, 820 So. 2d 152, 156-157 (Ala. 2001) (quotations and citations omitted).

ALASKA

"Under Alaska law, a defendant may always generally suggest that someone other than the defendant is guilty of the charged crime. But when a defendant wishes to implicate a specific individual, evidence of the third party's guilt is admissible only if the defense can produce evidence that tends to directly connect such other person with the actual commission of the crime charged. This rule derives from considerations of relevance and materiality; as we explained in *Marrone* v. *State*, such an initial evidentiary showing is necessary because if evidence of motive alone upon the part of other persons were admissible * * * in a case involving the killing of a man who had led an active and

NEVADA

Research revealed no reported decision addressing this issue specifically.

NEW HAMPSHIRE

Research revealed no reported decision addressing this issue specifically.

NEW JERSEY

"A defendant of course may seek to prove that another agency produced the death with which he is charged. It would seem in principle to be sufficient if the proof offered has a rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case. *** We think it not enough to prove some hostile event and leave its connection with the case to mere conjecture. Somewhere in the total circumstances there must be some thread capable of inducing reasonable men to regard the event as bearing upon the State's case." *New Jersey* v. *Sturdivant*, 155 A.2d 771, 778 (N.J. 1959).

"Courts must provide criminal defendants with a meaningful opportunity to present a complete defense. We have held that, by implication, a complete defense includes a criminal defendant's right to introduce evidence of third-party guilt if the proof offered has a rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case. That standard does not require a defendant to provide evidence that substantially proves the guilt of another, but to provide evidence that creates the possibility of reasonable doubt. However, a defendant cannot simply seek to introduce evidence of some hostile event and leave its connection with the case to mere conjecture. Rather, a defendant's proofs must be capable of

demonstrating some link between the third-party and the victim or the crime." *New Jersey* v. *Cotto*, 865 A.2d 660, 669-670 (N.J. 2005) (quotations and citations omitted).

NEW MEXICO

Research revealed no reported decision addressing this issue specifically.

NEW YORK

"In third-party culpability cases, the Appellate Divisions employ the 'clear link' standard, rather than couching their review in terms of weighing probative value against countervailing risks. Courts in other jurisdictions use similar phrases, such as 'direct connection' and 'point directly.' These catch phrases merely reinforce the notion that remote evidence of a third party's culpability—will not be sufficiently probative to outweigh the risk of trial delay, undue prejudice or jury confusion. As one commentator notes, phrases like 'clear link' are usually shorthand for weighing probative value against prejudice in the context of third-party culpability evidence: if there is some 'clear link' or 'direct connection between the third-party evidence and the charged crime, courts generally conclude that it is of sufficient probative value to be admissible. To the extent that the 'clear link' standard implies no more than an abbreviation for the conventional balancing test, it presents no problem. A review of clear link cases reveals that the courts would very likely have made the same ruling regardless of the nomenclature. * * * The better approach, we hold, is to review the admissibility of third-party culpability evidence under the general balancing analysis that governs the admissibility of all evidence. In this setting, we note that the countervailing risks of delay, prejudice and confusion are particularly acute. * * * The admission of evidence of

third-party culpability may not rest on mere suspicion or surmise." *People* v. *Primo*, 728 N.Y.S.2d 735, 739-740 (N.Y. 2001) (citations omitted).

NORTH CAROLINA

"The admissibility of evidence of the guilt of one other than the defendant is governed now by the general principle of relevancy stated in Rule 401. The rule of relevancy for evidence of this nature is that it must do more than cast doubt over the defendant's guilt merely because it is possible some other person could have been responsible for the crime with which he has been charged. Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. Under Rule 401 such evidence must tend *both* to implicate another *and* be inconsistent with the guilt of the defendant." *North Carolina* v. *Israel*, 539 S.E.2d 633, 637 (N.C. 2000) (quotations and citation omitted).

NORTH DAKOTA

Research revealed no reported decision addressing this issue specifically.

OHIO

Research revealed no reported decision addressing this issue specifically.

OKLAHOMA

"[E]vidence offered to show that some other person committed the crime charged must connect such other

person with the fact; that is some overt act on the part of another towards the commission of the crime itself. There must be evidence of acts or circumstances that tend clearly to point to another, rather than the accused." *Gore* v. *Oklahoma*, 119 P.3d 1268, 1274 (Okla. Crim. App. 2005); *Romano* v. *Oklahoma*, 847 P.2d 368, 381 (Okla. Crim. App. 1994).

OREGON

Research revealed no reported decision addressing this issue specifically.

PENNSYLVANIA

"An accused has a fundamental right to present evidence so long as the evidence is relevant and not excluded by established evidentiary rule. It is well established that evidence which demonstrates that the crime was committed by someone else is admissible." *Pennsylvania* v. *Chamberlain*, 731 A.2d 593, 597 (Pa. 1999) (citations omitted).

"The trial court determined that the offered testimony as to appellant's resemblance to another person was not relevant because there was no connection between this other person and the crime at issue. The newspaper article [suggesting another suspect] was excluded as hearsay. We find no abuse of discretion by the court in these rulings and appellant's claim of error must be rejected." *Pennsylvania* v. *Saksek*, 522 A.2d 70, 71-72 (Pa. Super. Ct. 1987).

RHODE ISLAND

"The defendant it appears was apparently trying to prove, through Salerno's testimony, that another person could have possibly committed the murder of Diaz. However, nothing in defense counsel's offer of proof disclosed any possible

connection between the shooting of Erickson Diaz and the presence of the yellow car. Although that car was allegedly seen near the scene of the shooting and coincidentally also at the scene of an earlier disturbance some several miles distant in the same city, there was nothing presented to the trial justice indicating that there was anything to connect the yellow car to the shooting of Diaz." *State* v. *Mendoza*, 709 A.2d 1030, 1035-1036 (R.I. 1998).

SOUTH CAROLINA

"The evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have no other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose." *Holmes* v. *State*, 605 S.E.2d 19, 23 (S.C. 2004).

SOUTH DAKOTA

"We find the case of *Perry* v. *Rushen*, 713 F.2d 1447 (9th Cir. 1983), persuasive. *** The Perry court summarized the rules as follows: Where the state interest is strong, only the exclusion of critical, reliable and highly probative evidence will violate due process. When the state interest is weaker, less significant evidence is protected. *** The court must balance the importance of the evidence against the state interest in exclusion. We then balance the equation in the

manner suggested in *Perry*. We start by giving due weight to the substantial state interest in preserving orderly trials, and judicial sufficiency [sic], and in excluding unreliable or prejudicial evidence." *South Dakota* v. *Luna*, 378 N.W.2d 229, 233-234 (S.D. 1985) (quotations omitted).

"The rule expressed in *Luna* dos not infringe upon [the defendant's] right to due process for the reason that the evidence, in her case, is so weak in probative value and presents such an opportunity to confuse the jury and to waste time to a far greater degree than in *Luna*." *South Dakota* v. *Jenner*, 451 N.W.2d 710, 722 (S.D. 1990) (citation omitted); accord *South Dakota* v. *Larson*, 512 N.W.2d 732, 740 (S.D. 1994).

TENNESSEE

"It has long been recognized by the courts of this state that an accused is entitled to present evidence implicating others in the crime. However, a clear standard for the admission of such evidence has never been articulated. A majority of states apply a 'direct connection' test in making this determination. Under a 'direct connection' test, the evidence must directly connect the third party with the substance of the crime and must clearly point out someone besides the accused as the guilty person in order to be admissible. We believe, however, that such a standard imposes too high a threshold for the admissibility of evidence concerning third-party culpability. We hold the Rules of Evidence are adequate to determine whether such evidence is admissible." *Tennessee* v. *Powers*, 101 S.W.3d 383, 394-395 (Tenn. 2003) (quotations and citation omitted).

TEXAS

"In weighing probative value against Rule 403 counterfactors, courts must be sensitive to the special

problems presented by 'alternative perpetrator' evidence. Although a defendant obviously has a right to attempt to establish his innocence by showing that someone else committed the crime, he still must show that his proffered evidence regarding the alleged alternative perpetrator is sufficient, on its own or in combination with other evidence in the record, to show a nexus between the crime charged and the alleged 'alternative perpetrator..'" *Wiley* v. *Texas*, 74 S.W.3d 399, 406 (Tex. Crim. App. 2002).

"The general rule is that an accused may not bring in evidence that a third person may have had a motive to commit the crime with which the accused is charged. An exception exists if the accused can link the third person to the crime." *Spence* v. *Texas*, 795 S.W.2d 743, 754-755 (Tex. Crim. App. 1990).

UTAH

Research revealed no reported decision addressing this issue specifically.

VERMONT

"Defendant is correct that as part of his defense he is permitted to introduce evidence implicating others in the crimes for which he is accused. Such evidence, however, must conform to the rules of evidence, and may be excluded when the danger of unfair prejudice or confusion substantially outweighs its probative value. We have previously stated the test for relevance of such evidence: evidence tending to show a third party's involvement in a crime should be admitted as long as motive and opportunity have been shown and *** there is also some evidence to directly connect the third person to the crime charged." *Vermont* v. *Grega*, 721 A.2d 445, 454 (Vt. 1998) (citations omitted)

VIRGINIA

"[W]here there is a trend of facts and circumstances tending clearly to point out some other person as the guilty party, the prisoner may introduce any legal evidence which is available tending to prove that another person committed the crime with which he is charged." *Karnes* v. *Commonwealth*, 99 S.E. 562, 565 (Va. 1919).

"The right to present evidence in one's defense does not, however, permit a defendant to introduce evidence that merely suggests or insinuates that because a third party resembles the accused, the third party *may* have some connection to the crime. Such evidence is irrelevant; it tends to confuse and mislead a jury unless evidence has been introduced * * * that points directly to guilt of a third party." *Oliva* v. *Virginia*, 452 S.E.2d 877, 880 (Va. Ct. App. 1995) (quotations and citations omitted).

WASHINGTON

"[E]vidence connecting another person with the crime charged is not admissible unless there is a train of facts or circumstances which tend clearly to point to someone other than the defendant as the guilty party." *Matter of Lord*, 868 P.2d 835, 849 (Wash. 1994) (*en banc*).

"When there is no other evidence tending to connect another person with the crime, such as his bad character, his means or opportunity to commit the crime, or even his conviction of the crime, such other evidence is irrelevant to exculpate the accused. Mere opportunity to commit the crime is not enough as such evidence is the most remote kind of speculation." *Washington* v. *Thomas*, 83 P.3d 970, 988 (Wash. 2004) (*en banc*) (quotations and citations omitted); *Washington* v. *Maupin*, 913 P.2d 808, 812 (Wash. 1996) (*en banc*).

WEST VIRGINIA

"In a criminal case, the admissibility of testimony implicating another person as having committed a crime hinges on a determination of whether the testimony tends to directly link such person to the crime, or whether it is instead purely speculative. Consequently, where the testimony is merely that another person had a motive or opportunity or prior record of criminal behavior, the inference is too slight to be probative, and the evidence is therefore inadmissible." *West Va.* v. *Parr*, 534 S.E.2d 23, 29 (W. Va. 2000); *West Va.* v. *Harman*, 270 S.E.2d 146, 150 (W. Va. 1980).

WISCONSIN

"The general rule is that evidence of motive of one other than the defendant to commit the crime can be excluded when there is no other proof directly connecting that person with the offense charged. * * * [A] defendant should not be required to establish the guilt of third persons with that degree of certainty requisite to sustain a conviction in order for this type of evidence to be admitted. On the other hand, evidence that simply affords a possible ground of suspicion against another person should not be admissible. Otherwise, a defendant could conceivably produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased—degenerating the proceedings into a trial of collateral issues. * * * Thus, as long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances, the evidence should be admissible." *Wisconsin* v. *Denny*, 357 N.W.2d 12, 16-17 (Wis. Ct. App. 1984) (quotations and citations omitted).

WYOMING

Research revealed no reported decision addressing this issue specifically.

Supreme Court, U.S.
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No. 04-1327

IN THE

Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether South Carolina's rule governing the admissibility of third-party guilt evidence violates a criminal defendant's constitutional right to present a complete defense grounded in the Due Process, Confrontation, and Compulsory Process Clauses?

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation of more than 10,000 attorneys and 28,000 affiliate members in all 50 States.[1] The American Bar Association ("ABA") recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and to ensure that criminal statutes are properly construed and applied.

STATEMENT OF THE CASE

The issues presented here often occur in cases that NACDL's members defend; namely, the evidentiary standards applicable to third-party guilt defenses. A patchwork of such standards presently exists, but even so, South Carolina's standard far more restrictive than that of other states and plainly far more restrictive than is constitutionally permissible. From the unique perspective of defense counsel whom must struggle with these standards in the course of everyday practice, NACDL seeks to address to address two issues of importance in this case. First, standards like South Carolina's cannot pass constitutional muster because they remove from the hands of jurors factual decisions that are

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus curiae* state that no counsel for a party authored any part of this brief, and no person of entity, other than the amici curiae, their members and their counsel made a monetary contribution to the preparation or submission of this brief.

uniquely the province of those jurors; namely, the weight to be given to evidence that is both relevant and probative of doubt as to the defendant's guilt. Second, NACDL addresses what type of third-party guilt standard exists that would pass constitutional muster.

At his trial on Capital murder charges, petitioner Bobby Lee Holmes sought to introduce evidence that another person, Jimmy White, a violent felon who more closely matched the physical description given by the victim, actually committed the crime. This evidence included testimony of four independent witnesses that White confessed to the crime. Petitioner also sought to introduce the testimony of four "proximity witnesses" who placed White near the victim's apartment near the time of the crime and at least two witnesses who saw White heading toward the victim's apartment building near the time of the attack. Petitioner's proffered evidence also included testimony of witnesses as to White's professed sexual interest in women around the age of the victim as well as his violent nature. Finally, Petitioner proffered evidence that the police, who had been told that White had been near the victim's apartment near the time of the attack, failed to test a footprint found near the victim's apartment which did *not* match Petitioner's, and that the police failed to test White's clothes for the victim's blood.

In a pre-trial hearing the trial judge, while acknowledging that Petitioner's proffered third-party guilt evidence was relevant, nonetheless ruled that the evidence was inadmissible. The trial judge found that White's multiple confessions must be excluded as hearsay, and that without the confessions the rest of the third-party guilt evidence did not clearly point to White as the perpetrator. On appeal the South Carolina Supreme Court did not follow the trial court's rationale for excluding the evidence, but nonetheless affirmed the trial court's ruling on the ground that the prosecution's case was "strong" and Petitioner had not "overcome" it with his proffered evidence of White's guilt.

SUMMARY OF THE ARGUMENT

As this Court has repeatedly recognized, a person charged with a crime has the right, through the Sixth and Fourteenth Amendments, to a fair opportunity to put forth a full and complete defense, unencumbered by burdensome and unfair "special" standards for the admission of defense evidence in the putting forth a defense. Where, as here, a criminal defendant has exercised his constitutional right to a trial by jury, his right to present a full and complete defense includes the right to have a jury (rather than the trial court) consider and weigh all relevant and probative evidence.

South Carolina's standards for determining the admissibility of third-party guilt evidence plainly violate these rights. By precluding the admission of such evidence when the prosecution's case is "strong," South Carolina denies the defendant the opportunity to have his evidence considered by the jury, even when such evidence supports his claim that he was not the person who committed the crimes of which he is accused. Moreover, South Carolina's standards unlawfully usurp the jury's constitutional role by empowering the trial judge to weigh the evidence and make the assessment of whether the prosecution's case is "strong.." In addition, the South Carolina standards are arbitrary because they establishes a far higher threshold for admitting third-party guilt evidence than other types of evidence relating to the defendant's guilt or innocence (including alibi evidence, even though both alibi evidence and third-party guilt evidence go to the same defense – that the defendant did not commit the crime for which he is charged).

Under the rulings of this Court, States may establish rules of evidence that serve legitimate State interests (such as the need to ensure that evidence is trustworthy and that the admission of certain evidence will not result in distraction and "mini-trials" on irrelevant issues. But the Court has also emphasized that such rules must be reasonable, non-arbitrary, and not disproportionate to the State's legitimate interests.

That standard is certainly one that States can meet without compromising their interests. For example, a State could satisfy constitutional requirements if its rule of evidence allowed a defendant to introduce evidence of the guilt of a third party as long as (1) his proffered evidence taken as a whole establishes probable cause to believe that the third party committed the offense for which the defendant is being tried and (2) the proffered evidence would (with one exception described herein) otherwise be admissible against the third party under the State's applicable rules of evidence if the State elected to prosecute the third party, rather than the defendant, for the alleged crimes.

South Carolina's standards, by contrast, fall woefully short of meeting constitutional requirements. Under any reasonable interpretation of due process and a defendant's Sixth Amendment rights, a defendant cannot receive a fair trial when State rules of evidence exclude all of his evidence of third-party guilt from the jury's consideration whenever the trial judge unilaterally determines that the prosecution's case is "strong." Yet that is precisely what happened in Petitioner's case. Because such a result is so flatly contrary to the Constitution, this Court should reverse Petitioner's conviction and death sentence.

I. FUNDAMENTAL FAIRNESS AND DUE PROCESS.

The ability of a defendant to tell his side of the story at trial with relevant and probative evidence that he chooses to present in his favor is an essential component of due process. Grounded in the Sixth and Fourteenth Amendments, this Court has established in its decisions an irreducible minimum due process standard which requires that a State must provide a person charged with a crime with a meaningful opportunity to put forth a full and complete defense before a jury. South Carolina's requirements regarding the admissibility of evidence of third-party guilt, however, fail to meet this standard.

This Court has recognized that due process confers on a criminal defendant the right to put forth a full and complete defense before a jury, including the right to present all relevant and probative evidence that is favorable to a defense, subject to reasonable evidentiary rules, and to have that evidence considered by a jury in determining a defendants guilt. See, *e.g.*, *United States* v. *Scheffer*, 523 U.S. 303, 315 (1998); *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986). The Court has expressly recognized that, under the Due Process Clause of the Fourteenth Amendment and the Compulsory Process and Confrontation Clauses of the Sixth Amendment, a criminal defendant must be given "a meaningful opportunity to present a complete defense"—*i.e.*, a right to make a full defense, and tell his or her story, by presenting relevant and probative evidence that supports his case. See, *e.g.*, *California* v. *Trombetta*, 467 U.S. 479, 485 (1984). See also *Crane*, 476 U.S. at 689 (finding unconstitutional a Kentucky rule which barred defendant from placing evidence of the facts and circumstances surrounding his confession, which had been found by a judge pre-trial to have been voluntary before jury, as violating his right to the fair opportunity to present a defense); *Rock* v. *Arkansas*, 483 U.S. 44, 52 (1987) (Arkansas *per se* rule excluding all hypnotically refreshed testimony of defendant struck down as impermissibly restricting defendant's right to conduct her own defense). That right necessarily includes the right to present that complete defense and tell one's story directly to a jury, by virtue of the right to a jury trial guaranteed by the Sixth Amendment. See *Duncan* v. *Louisiana*, 391 U.S. 145, 160 (1968).

It is the fundamental role of counsel for the defense to present such evidence and to ensure that all relevant facts are before the jury for their decision. See *Burger* v. *Kemp*, 483 U.S. 776, 788 (1987) (defense counsel's role is "to ensure that the adversarial testing process works to produce a just result" (citation omitted)); *Powell* v. *Alabama*, 287 U.S. 45, 60

(1932) (defendants rape conviction and death sentence reversed because their new counsel performed no preparation nor investigation and presentation of facts). Often, this is done by challenging the prosecution's case alone. While a defendant has no obligation to present a defense, where evidence of actual innocence exists, it is an imperative in our adversarial system of criminal justice that the defense be afforded every reasonable opportunity to adduce his or her own facts and to present them to the fact-finders. The prosecution controls the nature and the timing of the charge, and the jury hears the prosecution's evidence first. As a practical matter, a defense presentation is often necessary in order for there to be any reasonable prospect of persuading a jury to return a verdict of not guilty. Where a defendant claims innocence, a jury, having heard the prosecution's case, will naturally expect a defendant to present evidence supporting that claim of innocence. To the extent that a defendant does not or cannot fully and completely present his or her case, the jury is likely to regard the prosecution's facts as unrebutted.

This Court has acknowledged these realities repeatedly. For example, in *Old Chief* v. *United States,* 519 U.S. 172, 188 (1997), the Court stated that "a juror's obligation to sit in judgment" involves "the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be." The Court further emphasized that in evaluating the evidence that a party proffers in presenting a case, a trial judge must recognize a "party's need for evidentiary richness and narrative integrity," because "[i]f [jurors'] expectations are not satisfied, triers of fact may penalize the party who disappoints them by drawing a negative inference against that party." *Id.* (second alteration in original). Although *Old Chief* involved evidence that the prosecution sought to introduce in a criminal trial, it is equally applicable to the defense, because only by allowing a defendant to put forth a full and complete defense, or

completely and fully tell his or her story, can "jurors' expectations be satisfied" to avoid a jury unjustly "penalizing" a defendant by "drawing negative inferences" against that defendant because of a lack of narrative integrity.

The numerous cases of this Court recognizing a defendant's right to present a complete defense make clear that this right includes two critical components. *First*, the defendant has the constitutional right to have the jury consider the evidence that he wishes to present in support of his defense in the determination of his or her guilt. This right is evidenced by numerous rulings of this Court, including: the Court's ruling that a defendant has a constitutional "right to offer the testimony of witnesses [to the jury], and to compel their attendance, if necessary," *Washington* v. *Texas*, 388 U.S. 14, 18-19 (1967) (compulsory process clause of Sixth Amendment); the Court's recognition of a defendant's right to confront, cross-examine, and impeach all witnesses testifying before the jury, even witnesses called by defendant, *Crawford* v. *Washington*, 541 U.S. 36, 42 (2004) (confrontation clause of Sixth Amendment) and *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973) (same); the duty of the State to reveal to the defendant the contents of plea agreements with key state witnesses which could effect reliability and credibility determinations of the jury, *Giglio* v. *United States*, 405 U.S. 150, 155-156 (1972) (due process clause of Fourteenth Amendment); a State's duty to turn over to a criminal defendant exculpatory evidence in its possession which could raise a reasonable doubt before the jury as to the defendant's guilt, even in the absence of a request for such evidence by the defendant, *United States* v. *Agurs*, 427 U.S. 97, 112 (1976) (compulsory process clause of Sixth Amendment); the prohibition against intentional post-indictment delaying activity by a State which results in the loss of evidence that prejudices the intended defense, *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977) (speedy-trial guarantee of Sixth Amendment); the Court's recognition of the right of a

defendant to the State's assistance in compelling the attendance and testimony at trial of favorable defense witnesses, *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 55 (1987) (compulsory process clause of Sixth Amendment); and the Court's recent decisions ruling that a criminal defendant has the constitutional right to have all facts which go to guilt or sentencing placed before jury, *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000) (Sixth Amendment right to jury trial and due process clause of Fourteenth Amendment), *Blakely* v. *Washington*, 542 U.S. 296, 313-14 (2004) (same), and *United States* v. *Booker*, 125 S. Ct. 738, 749-50 (2005) (Sixth Amendment right to jury trial).

Second, the Sixth Amendment gives a defendant the right to have a jury, rather than a judge, make the ultimate determination of all facts which go to the elements of guilt or to the sentence imposed in a criminal charge. State and federal procedures that remove fact-intensive decision making from the hands of the jury have therefore repeatedly been struck down by this Court. See, *e.g.*, *Apprendi*, 530 U.S. at 491-92 (New Jersey Hate Crime Statute held unconstitutional because it allowed trial judge to increase time of sentence for possession of firearm conviction beyond that proscribed in the firearm statute upon finding of the existence of aggravating facts by judge, rather than by jury); *Blakely*, 542 U.S. at 313-14 (Washington sentencing statute, which allowed judge to exceed maximum sentence for that proscribed by criminal statute based on judge's finding of facts neither admitted by defendant nor found by jury, held unconstitutional); *Booker*, 125 S. Ct. at 749-50 (Federal Sentencing Act unconstitutional to extent that it mandated the imposition of sentences in the higher range under the criminal statute violated, based upon facts found by a judge and not a jury). Accordingly, as part of the right to present a complete defense, a defendant has the "right to present the defendant's version of the facts . . . *to the jury*" in order for the jury to "decide where the truth lies," *Washington* v. *Texas*, 388 U.S. at 18-19 (Sixth Amendment

right to jury trial) (emphasis added); the right to present to the jury all facts which may affect the jury's reliability and credibility determinations of the State's witnesses, *Giglio*, 405 U.S. at 155-56 (due process clause of the Fourteenth Amendment); and the "right to put before a jury evidence that might influence the determination of guilt," *Ritchie*, 480 U.S. at 56 (Sixth Amendment right to jury trial).

A defendant's right to have a jury rather than a judge make all determinations of facts that go to guilt, includes—except in limited circumstances[2]—the right to have the jury, rather than a judge make the credibility and reliability determinations as to evidence placed before it, *Rock*, 483 U.S. at 53-55 (based on Sixth Amendment right to jury trial); answer questions of materiality as to any facts which go towards issue of guilt, *United States* v. *Gaudin*, 515 U.S. 506, 518-19 (1995) (due process clause of the Fifth Amendment and Sixth Amendment right to jury trial); make determinations as to all elements of a crime be free of conclusive presumptions, *Neder* v. *United States*, 527 U.S. 1, 10 (1999) (Sixth Amendment right to jury trial); and determine the existence of "any fact [other than fact of a prior conviction] that increases the penalty for a crime beyond the prescribed maximum," *Apprendi*, 530 U.S. at 490 (same). In short, the Constitution requires that in a criminal trial before a jury

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[2] This Court has stated that "'relevant[] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *Montana* v. *Egelhoff*, 518 U.S. 37, 42 (1996) (plurality opinion) (quoting Fed. R. Evid. 403). The evidence of third-party guilt proffered by Petitioner in this case does not fall into any of these categories. The trial judge conceded that the evidence was relevant because it went to the core issue of whether Petitioner was the person who raped, robbed, and murdered the victim. As discussed below, both the trial judge and the Supreme Court of South Carolina excluded this evidence for reasons totally unrelated to any danger of prejudice, delay, misleading the jury, or confusion of the issues.

"questions of credibility," *Crane*, 476 U.S. at 688, and determinations of evidentiary "weight," *Pinto* v. *Pierce*, 389 U.S. 31, 33-34 (1967), are the province of juries, not judges.

This Court has also rejected the very reasoning that South Carolina relies upon to justify its overly stringent standard. The Court has held that when a defendant seeks to have the jury consider evidence that is relevant to the charges at issue, a State cannot restrict or impair that right on the ground that allowing such evidence would result in a "mini-trial" or "sideshow." See, *e.g.*, *Crane*, 476 U.S. at 686-88. In *Crane* the State argued that a defendant should not be allowed to present to the jury the facts and circumstances of his confession of guilt to show that his confession was unworthy of belief due to the manner in which it was obtained, because the confession already had been found by a judge to have been voluntary in a pre-trial conference. The Court, focusing on the Constitution's guarantee that a defendant be provided a "meaningful opportunity to present a complete defense," *id.* at 690 (citation omitted), rejected the State's argument that allowing the jury to consider the defendant's proffered evidence would result in relitigating a resolved legal matter and stated:

> [S]tripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.

Id. at 689.[3]

The right of a defendant to put forth a full and complete defense before a jury, and have the jury make all factual determinations as to the elements of guilt, has even indirectly impacted this Court's analysis in cases dealing with the burdens of proof that the state and defendant must bear in criminal trials. For example, in *Martin* v. *Ohio*, 480 U.S. 228, 236 (1987), this Court held that Ohio's rule requiring a defendant to prove by a preponderance of the evidence the affirmative defense of self-defense did not violate due process because such rule did not prevent the defendant from placing before the jury any evidence supporting his claim of self-defense for the purpose of creating reasonable doubt as to whether the state had proven the necessary element of purposeful killing with prior calculation and design to sustain a conviction of murder. Plainly referring to the right of the defendant in that case to tell her story to the jury, this Court stated:

> It would be quite different if the jury had been instructed that self-defense evidence could not be considered in

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[3] The Court noted that whether a confession was voluntary was a legal matter, to be properly resolved by a judge, while credibility of a confession was entirely a factual matter to be placed before and determined by a jury. *Crane*, 476 U.S. at 688-89. Allowing the latter did not undercut the function of the former because, as the Court stated, the former simply served to ensure that voluntary confessions obtained through the use of "certain interrogation techniques" held to be "so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment" are not placed before a jury in the first instance. *Id.* at 687. The Court added that a confession which has met the minimum legal threshold of being voluntary because of the absence of offensive "interrogation techniques" may still be challenged as unreliable because of the "physical and psychological environment that yielded the confession" which can be "of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence," and that even confessions "found to be voluntary, are not conclusive of guilt." *Id.* at 688-89.

> determining whether there was a reasonable doubt about the State's case, i.e., that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard.

Id. at 233-34 (emphasis added) (citation omitted). Clearly, under *Martin* and the other above-described decisions of this Court, a State may not erect tests of evidentiary weight – whether through special rules of evidence, allocations of burdens of proof, or otherwise – that impair a defendant's right to make a full and complete defense.

II. SOUTH CAROLINA'S STANDARDS REGARDING THE ADMISSIBILITY OF THIRD-PARTY GUILT ARE ALSO UNCONSTITUTIONAL BECAUSE THEY ARE ARBITRARY AND DISCRIMINATORY.

South Carolina's standards governing the admissibility of evidence of third-party guilt also violate Petitioner's constitutional rights because they unfairly, and arbitrarily, impose a severe burden upon one particular type of defense evidence relating to the issue of whether the defendant is guilty of the crimes of which he is accused. These standards are unfair because the prosecution labors under no similar, special restrictions in seeking to present evidence to a jury supporting its allegations of a defendant's guilt. They are arbitrary because no other type of evidence relating to the issue of a defendant's guilt is subject to similarly burdensome requirements and because South Carolina's regular Rules of Evidence already protect against the admission of evidence that might confuse the issues or mislead the jury.

Although a defendant's right to present relevant evidence is subject to reasonable restrictions, that right is violated if a State's evidentiary standards are arbitrary or disproportionate to the State interests that they are purportedly designed to serve. See, *e.g.*, *Scheffer*, 523 U.S. at 308; *Michigan* v. *Lucas*, 500 U.S. 145, 151 (1991); *Rock*, 483 U.S. at 55-56.

Thus, a State cannot constitutionally apply one evidentiary standard to the prosecution but a different one to the defendant. *See, e.g., Washington* v. *Texas*, 388 U.S. at 22 (finding irrational a Texas rule that permitted accomplices to testify for the State, but not for the defendant). Nor may a State apply arbitrary rules of evidence to exclude relevant and probative evidence offered by the defense. *E.g., Rock*, 483 U.S. at 55 (holding that Arkansas' *per se* rule excluding all hypnotically refreshed testimony was an arbitrary infringement of the defendant's right to present testimony); *Chambers* v. *Mississippi*, 410 U.S. at 294-302 (finding, as a violation of defendant's "right to a fair opportunity to defend against the State's accusations," the refusal of Mississippi's trial court to allow the admission of an accused's evidence of third-party guilt on the basis of the State's hearsay rule and common-law rule that a party cannot impeach his own witness).

South Carolina's special standards governing the admissibility of third-party evidence are arbitrary in two specific ways. First, South Carolina applies those standards to no other type of evidence offered at trial. Second, South Carolina's standards govern only the admissibility of evidence that a third party committed the alleged crimes, and not to evidence supporting an alibi – even though both types of evidence make the same claim (that another person committed the crime). The State cannot provide any rational basis for these distinctions, for its special standards regarding the admission of third-party guilt evidence are grossly disproportionate to any legitimate State interests.

A. No Other Type Of Evidence Offered In Criminal Trials In South Carolina Regarding A Defendant's Guilt Or Innocence Is Subject To The Additional Standards Of Admissibility That The State Applies To Evidence Of Third-Party Guilt.

In South Carolina, evidence relating to the issue of the defendant's guilt or innocence is ordinarily governed only by the South Carolina Rules of Evidence. Under Rules 401 and

402, such evidence is generally admissible in South Carolina courts as long as it is "relevant evidence" – which the rules define as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable *or less probable* than it would be without the evidence."[4] South Carolina courts have affirmed this principle of broad admissibility, stating: "Evidence which assists the jury in arriving at the truth of an issue is relevant and admissible unless otherwise incompetent."[5] Rule 403 provides, however, that even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[6]

The relevance requirements of Rules 401 and 402, and the balancing test set forth in Rule 403, apply to any evidence that the prosecution seeks to introduce supporting its claim that the defendant committed the alleged crimes.[7] And they

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[4] *See* S.C. R. Evid. 401 (emphasis added); *id.*, Rule 402. *See also, e.g., State* v. *Alexander*, 401 S.E.2d 146, 148 (S.C. 1991) ("Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.").

[5] *E.g., State* v. *Schmidt*, 342 S.E.2d 401, 403 (S.C. 1986); *State* v. *Sweat*, 606 S.E.2d 508, 513 (S.C. Ct. App. 2004).

[6] *See* S.C. R. Evid. 403. This rule is identical to Rule 403 of the Federal Rules of Evidence. The Supreme Court of South Carolina adopted the language of the federal rule relating to the danger of unfair prejudice in *State* v. *Alexander*, 401 S.E.2d at 149.

[7] *See, e.g., State* v. *Sweat*, 606 S.E.2d at 513-17 (finding that, in criminal trial where defendant was accused of burglary, assault and battery with intent to kill, and assault of a high and aggravated nature, prosecution's evidence of defendant's prior abuse of ex-girlfriend (and resulting conviction) were relevant to issues of motive and intent, and probative value of evidence was not outweighed by the danger of unfair prejudice); *State* v. *Douglas*, 597 S.E.2d 1, 5-6 (S.C. Ct. App. 2004) (reversing defendant's conviction for murder and armed robbery of her

apply to evidence that the defendant seeks to offer in support of his claim of innocence (which is "relevant evidence," because it tends to make it "less probable" that the defendant is guilty as charged).[8] As long as the defendant's evidence satisfies these standards (and the other standards set forth in the Rules of Evidence), the evidence supporting his claim will be admitted – *unless* that evidence tends to show that a specific individual other than the defendant committed the crime. Under this peculiar exception, the defendant must *further* satisfy South Carolina's special standards governing evidence of third-party guilt, including the requirement of demonstrating that the evidence raises a "reasonable inference" of his innocence. Even if the defendant is able to do so, his evidence *still* will be not be admitted if the trial court finds that the prosecution's case is "strong."

Under any reasonable interpretation, the Due Process Clause (including a defendant's rights under the Sixth Amendment, as applied to the States by the Due Process

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husband because trial court erred in admitting testimony by prosecution witness, an insurance agent, that defendant had expressed interest in purchasing – but had not actually purchased – an insurance policy on her husband's life; such testimony was irrelevant to issue of motive because there was no insurance policy from which defendant could benefit, and such testimony was clearly prejudicial to defendant); *State* v. *Cheeseboro*, 552 S.E.2d 300, 312-13 (S.C. 2001) (holding that, in trial for murder, kidnapping, and assault, trial judge erred in admitting into evidence a "rap" song written by defendant as an admission against interest; lyrics of song had "minimal probative" value, given their vagueness, and any probative value was outweighed by its unfair prejudicial impact as evidence of defendant's bad character).

[8] *See, e.g., Schmidt*, 342 S.E.2d at 402-03 (reversing defendant's conviction because trial judge improperly excluded defendant's offer of testimony showing hard feelings between the child's family and defendant's family; such evidence was "clearly relevant" and its exclusion denied defendant a fair trial, since his entire defense at trial was that he did not commit the alleged act and that the charge of criminal sexual conduct with a minor was concocted by child's parents as part of a "vendetta" against him).

Clause) requires that the same evidentiary standards be applied at trial to evidence regarding the defendant's guilt or innocence, regardless of whether the evidence is presented by the prosecution or the defense. As this Court has recognized in the context of the Due Process Clause of the Fifth Amendment, "discrimination may be so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).[9] The special evidentiary standards that South Carolina imposes on evidence of third-party guilt constitute precisely such discrimination.

There can be no legitimate justification for subjecting a defendant's evidence of third-party guilt to additional evidentiary "hurdles" that the prosecution is not required to meet *even when the prosecution seeks to introduce the same types of evidence.* In its response to the petition for *certiorari* in this case, the State defended its special evidentiary rules by (1) accusing the Petitioner of requesting this Court to impose uniform evidentiary standards on the States, and (2) rationalizing that the special evidentiary requirements are intended to ensure that any evidence of third-party guilt considered by the jury will be "trustworthy," "reliable," and "competent." The State's first argument is a red herring. Neither the Petitioner nor *amici* ask that this Court adopt uniform national evidentiary standards for State courts; rather, they request only that the Court make clear that South Carolina's special evidentiary standards regarding the admissibility of third-party guilt evidence are contrary to the requirements of the Due Process Clause.

The State's more germane suggestion that its special standards are necessary to preclude untrustworthy, unreliable, or incompetent evidence is nonetheless also without justification. South Carolina courts already possess ample

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[9] *See also, e.g., Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 213-18 (1995); *Examining Bd. of Eng'rs, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 601 (1976).

authority, under the South Carolina Rules of Evidence, to exclude untrustworthy, unreliable, or incompetent evidence.[10] They also allow trial cou[illegible]s to exclude, under Rule 403, evidence that "confuses the issues" or evidence that is "misleading to the jury." Such decisions are reviewed on a highly deferential "abuse of discretion" standard.[11] The existing rules even specifically address the admissibility of statements of third parties who acknowledged that they committed the alleged crime, stating that such statements are not admissible for the purpose of exculpating a criminal defendant "unless corroborating circumstances clearly indicate the trustworthiness of the statement." S.C. R. Evid. 804(b)(3).[12]

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[10] *See, e.g.*, S.C. R. Evid. 602 (prohibiting testimony of witness about a matter of which the witness has no personal knowledge); S.C. R. Evid. 802 (general rule against admissibility of hearsay).

[11] *See, e.g., State* v. *McLeod*, 606 S.E.2d 215, 218-19 (S.C. Ct. App. 2004); *State* v. *Saltz*, 551 S.E.2d 240, 244 (S.C. 2001); *State* v. *Tucker*, 462 S.E.2d 263, 265 (S.C. 1995). The South Carolina appellate courts will reverse the decision of the trial judge under Rule 403 regarding the comparative probative value of the evidence with the danger of unfair prejudice, confusion of the issues, or misleading of the jury "only in exceptional circumstances." *State* v. *Horton*, 598 S.E.2d 279, 286 (S.C. Ct. App. 2004).

[12] In its explanatory notes accompanying this provision, the Supreme Court of South Carolina stated that the provision "is consistent with South Carolina law," (citing *State* v. *Doctor*, 413 S.E.2d 36 (S.C. 1992)). Furthermore, The court's citation of *Doctor* is ironic, because the evidence at issue in that case was proffered by the defendant to show that a third party had committed the crime – and the court ruled that the exclusion of such evidence at trial was error, *without* applying the additional evidentiary standards that it applied in Petitioner's case. In *Doctor*, where the defendant was accused of armed robbery, the State alleged that the defendant, accompanied by two other boys, demanded that the victim turn over the keys to his car and, after the victim initially refused, the defendant pointed a gun to his head to force him to surrender his keys. At trial, one minor testified that he and two other boys were the individuals who had committed the theft of the car – and that the defendant was not involved. When the other two minors implicated by this testimony

For these reasons, there can be no justification for subjecting evidence of third-party guilt to additional evidentiary requirements to achieve this result, when other types of evidence relating to the defendant's guilt or innocence is not subject to the same requirements. If a defendant seeks to offer testimony of witnesses that a third party committed the alleged crime, or was at or near the scene of the crime at the time the crime was committed, due process demands that the testimony should be governed by the same standards regarding the admissibility of all other evidence going to the defendant's guilt or innocence.[13]

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refused to testify (invoking their Fifth Amendment privilege), the defendant then attempted to introduce the testimony of his investigator, who would have testified that both of the minors had confessed to the theft, and that their confessions matched in detail the testimony of the minor who did testify. The Supreme Court of South Carolina held that the trial court's exclusion of such evidence was reversible error, noting that the testimony was "valuable to the defendant and its exclusion was not harmless." 413 S.E.2d at 38. In ruling that the testimony was admissible, the court did not determine whether the this third-party guilt evidence satisfied the standards established in both *State* v. *Gregory*, 16 S.E.2d 532 (S.C. 1941) and *State* v. *Gay*, 541 S.E.2d 541 (S.C. 2001), which are at issue in this appeal.

[13] Comparing South Carolina's third-party guilt evidence standard to other special evidentiary standards, such as standards that apply to evidence of an accuser's sexual history in a rape case, would be misplaced. For example, "rape shield" statutes impose restrictions on a defendant's ability to present evidence of the accuser's sexual history because of a "legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." *Michigan* v. *Lucas*, 500 U.S. at 150. *See also State* v. *Finley*, 387 S.E.2d 88, 90 (S.C. 1989) (State's rape shield stature reflects its interest in protecting criminal sexual assault victims). Those concerns are fundamentally different from concerns about reliability and distraction. Furthermore, the evidentiary restrictions that rape shield statutes impose are vastly different from – and far less burdensome than – South Carolina's requirements regarding third-party guilt evidence. First, rape shield statutes do not prohibit all evidence of a victim's prior sexual activity, and do not make the admissibility of such evidence dependent on

B. South Carolina's Special Standards Of Admissibility Regarding Evidence Of Third-Party Guilt Are Arbitrary Because They Do Not Apply To Alibi Evidence, Even Though Both Types Of Evidence Involve The Same Basic Defense.

The burdensome restrictions that South Carolina imposes on the admissibility of evidence of third-party guilt stand in stark contrast to the evidentiary standards that South Carolina has established regarding alibi evidence. Both types of evidence involve the same basic defense: that the defendant is not the person who committed the crime. Evidence of third-party guilt seeks to show that a specific individual other than the defendant committed the crime, whereas alibi evidence is presented to establish that the defendant *could not have*

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whether the prosecution has presented "strong" evidence of a defendant's guilt. *See, e.g.*, S.C. Code Ann. § 16-3-659.1 (allowing evidence of prior sexual conduct between accuser and defendant to be admitted, if judge finds that it is relevant and that probative nature of evidence outweighs any prejudice); *Finley*, 387 S.E.2d at 90 (defendant should have been permitted to introduce evidence of accuser's sexual activity on evening before alleged rape because evidence was relevant to issues of motive, bias, and prejudice on part of accuser); *State* v. *Grovenstein*, 530 S.E.2d 406, 411 (S.C. Ct. App. 2000) (holding that, notwithstanding rape shield statute, trial court erred in excluding defendant's preferred evidence of child accusers' sexual experience, because it was relevant to defendant's contention that he was not the source of their ability to testify about the sexual conduct they alleged); *State* v. *Lang*, 403 S.E.2d 677, 678 (S.C. Ct. App. 1991) (holding that defendant was entitled to introduce evidence of victim's sexuality to im-peach victim's credibility). Third, rape shield laws like South Carolina's impose no special evidentiary standards that a defendant's evidence must meet in order to be admissible (such as raising a "reasonable inference" of innocence), but instead require only that the defendant provide advance notice to the court and the prosecution when he proposes to offer such evidence. S.C. Code Ann. § 16-3-659(2). Finally, both this Court and the South Carolina courts have recognized that even when particular evidence is otherwise precluded under a rape shield statute, such evidence must be admitted when precluding such evidence would violate a defendant's constitutional rights. *See Michigan* v. *Lucas*, 500 U.S. at 150-53; *Finley*, 387 S.E.2d at 90.

committed the crime because "he was not at the scene of the crime at the time of its commission." *State* v. *Robbins*, 271 S.E.2d 319, 320 (S.C. 1980).[14] Yet, although both types of evidence seek to establish that someone else committed the crime, alibi evidence is not subjected to the evidentiary hurdles that confront evidence of third-party guilt.

Under the rules of criminal procedure in the South Carolina courts, upon written request of the prosecution (which must state in the request the time, date, and place at which the alleged offense occurred), a defendant seeking to present alibi evidence must serve the prosecution with a written notice of his intent to offer such evidence. The defendant must also describe in that notice the specific place(s) where the defendant claims to have been at the time of the alleged offense, and the names and addresses of the witnesses upon whom he intends to rely to establish his alibi. S.C. R. Crim. P. 5(e)(1). If the defendant fails to provide the notice, the trial court may exclude the testimony of any undisclosed witness.[15]

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[14] Thus, under South Carolina law, a defendant can simply allege that someone else committed the alleged crime without showing an alibi. *See, e.g., State* v. *Anders*, 483 S.E.2d 780, 785 (S.C. Ct. App. 1997) (charge on alibi is not necessary when accused merely denies committing the crime); *State* v. *Schrock*, 322 S.E.2d 450, 452 (S.C. 1984) (accused person has no obligation to prove that he was somewhere else at the time and place of the crime).

[15] S.C. R. Crim. P. 5(e)(4). The rule, however, provides that the defendant shall be permitted to testify on his own behalf to support his claim of alibi regardless of whether he included himself in the notice. Id. The rule also requires that after the defendant serves his notice of alibi, the prosecution must serve upon the defendant or his attorney the names and addresses of the witnesses upon whom the State intends to rely to establish the defendant's presence at the scene of the alleged crime. If the prosecution fails to disclose particular witnesses in its notice, the trial court may exclude such testimony. S.C. R. Crim. P. 5(e)(2), (e)(4). *See also Wardius* v. *Oregon*, 412 U.S. 470 (1973) (holding that the Due Process Clause of the Fourteen Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants).

Other than this procedural requirement, however, alibi evidence is not subject to special evidentiary standards or requirements in South Carolina criminal trials. Indeed, the South Carolina courts have repeatedly emphasized that alibi is *not* an affirmative defense that imposes the burden of proof on that issue upon the defendant; the burden remains at all times on the prosecution to prove that the defendant was present at the scene of the crime at the time alleged, and actually committed the crime.[16]

Under South Carolina law, a defendant is permitted to produce any evidence that supports his alibi, as long as the evidence meets the evidentiary standards (such as relevance) applicable to evidence generally under the South Carolina Rules of Evidence. That proof must consist of evidence that "attempt[s] to show the impossibility of being involved in [the] crime due to absence from the scene." *Anders*, 483 S.E.2d at 785.[17] Furthermore, the defendant is not required to produce *any* witnesses of his own to establish an alibi; the alibi "may be established as well by the testimony of witnesses for the prosecution." *State* v. *Mayfield,* 109 S.E.2d 716, 724 (S.C. 1959).

Trial courts in South Carolina do not perform the same "gatekeeping" function regarding alibi evidence that they are required to perform when the defendant seeks to offer evidence that a named third party committed the alleged crime. The Supreme Court of South Carolina has long made it clear that alibi evidence is not to be subjected to different evidentiary standards. For example, in reversing a conviction

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[16] *See, e.g., State* v. *Schrock*, 322 S.E.2d at 452; *Roseboro* v. *State*, 454 S.E.2d 312, 313 (S.C. 1995); *State* v. *Mayfield*, 109 S.E.2d 716, 724 (S.C. 1959).

[17] *See also, e.g., State* v. *Diamond*, 312 S.E.2d 550, 550 (S.C. 1984) ("To establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime.") (quoting *State* v. *Robbins*, 271 S.E.2d at 320).

because the trial judge had instructed the jury that alibi evidence "is always to be received with caution," the Supreme Court of South Carolina stated that such evidence:

> [I]s entitled to be considered by the jury under all the facts and circumstances of the case the same as any other defense, and it is for them to say what credence they give to it and do not have to receive it with any more caution than they do any other evidence in the case.

State v. *Smalls*, 82 S.E. 421, 422 (S.C. 1914). The trial court may refuse to allow the jury to consider a defendant's claim of alibi only if the defendant has presented *no* evidence tending to show that at the time of the alleged crime he was at an entirely different location, making it impossible for him to have been at the crime scene.[18]

South Carolina courts have regarded the defendant's right to present alibi evidence as a critical prerequisite to a fair trial. For example, the Supreme Court of South Carolina has recognized that "[A]n alibi charge is considered especially crucial when the [prosecution's] evidence is entirely circumstantial." *Roseboro* v. *State*, 454 S.E.2d 312, 313 (S.C. 1995). Thus, under South Carolina law, the failure of a trial court to give an alibi charge to the jury, where the defendant claims to have been at another place at the time of the crime, is reversible error. *Riddle* v. *State*, 418 S.E.2d 308, 309 (S.C. 1992); *State* v. *Robbins*, 271 S.E.2d at 320. Under the decisions of the South Carolina courts, defense counsel will be found to have rendered deficient representation if it failed

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[18] *See, e.g., State* v. *Diamond*, 312 S.E.2d at 551 (trial judge properly refused to charge jury on law of alibi, because accused could not recall at trial his whereabouts at the time of the crime, and mere denial of one's presence at the scene does not constitute an alibi); *State* v. *Elmore*, 308 S.E.2d 781, 784 (S.C. 1983) (trial judge did not err by failing to charge the law of alibi, since defendant at trial was unable to remember, with any degree of certainty, where he was at the time of the crime, and thus did not remove possibility that accused was guilty as charged).

to request an alibi charge when evidence existed in the record that the defendant was at another location at the time of the crime.[19]

* * * *

South Carolina's vastly different – and less stringent – standards for the presentation of alibi evidence only further confirm the arbitrariness of its standards governing the admissibility of third-party guilt evidence. Although both types of evidence support a defendant's claim that he did not commit the crime, evidence of third-party guilt, in effect, goes one step further and identifies the specific perpetrator of the crime (in contrast to alibi evidence, which simply shows that *someone* other than the defendant was the perpetrator). Yet any defendant who goes that extra step in his narrative, rather than merely leaving the jury "in the dark" as to the identity of the actual offender, is subjected to additional, burdensome evidentiary standards that effectively preclude the admission of such evidence. There can be no rational basis for such a distinction, other than to penalize a defendant who attempts to provide more specifics to support his case, and deny a defendant his or her right to present relevant evidence to the jury at trial. South Carolina's standard presents a clear constitutional error in that it substantially infringes upon a fundamental right of the accused – the constitutional right to a fair opportunity to defend against the State's accusations (including the right to offer evidence supporting a defense that a particular third party was the individual who committed the crimes). Accordingly, the defendant's conviction and death sentence cannot stand.

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[19] *Roseboro* v. *State*, 454 S.E.2d at 313; *Ford* v. *State*, 442 S.E.2d 604, 606 (S.C. 1994); *Riddle* v. *State*, 418 S.E.2d 308 (S.C. 1992). In these circumstances, the courts will make a finding of ineffective assistance of counsel (and will reverse the defendant's conviction) unless defense counsel articulates a valid reason for employing such a strategy. *Id.*

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of South Carolina should be reversed.

Respectfully submitted

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November 30, 2005

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HOLMES *v.* SOUTH CAROLINA

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 04–1327. Argued February 22, 2006—Decided May 1, 2006

At petitioner's South Carolina trial for murder and related crimes, the prosecution relied heavily on forensic evidence that strongly supported petitioner's guilt. Petitioner sought to undermine the State's forensic evidence by introducing expert testimony suggesting that the evidence had been contaminated and that the police had engaged in a plot to frame him. Petitioner also sought to introduce evidence that another man, Jimmy McCaw White, had been in the victim's neighborhood on the morning of the assault and that White had either acknowledged petitioner's innocence or admitted to committing the crimes himself. In White's pretrial testimony, he denied making the incriminating statements and provided an alibi for the time of the assault.

The trial court excluded petitioner's third-party guilt evidence citing the State Supreme Court's *Gregory* decision, which held such evidence admissible if it raises a reasonable inference as to the defendant's own innocence, but inadmissible if it merely casts a bare suspicion or raises a conjectural inference as to another's guilt. Affirming the trial court, the State Supreme Court cited both *Gregory* and its later decision in *Gay*, and held that where there is strong forensic evidence of an appellant's guilt, proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence. Applying this standard, the court held that petitioner could not overcome the forensic evidence against him.

Held: A criminal defendant's federal constitutional rights are violated by an evidence rule under which the defendant may not introduce evidence of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict. "[S]tate and federal rulemakers have broad latitude under the Con-

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stitution to establish rules excluding evidence from criminal trials." *United States* v. *Scheffer*, 523 U. S. 303, 308. This latitude, however, has limits. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane* v. *Kentucky*, 476 U. S. 683, 690. This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are " 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " *Scheffer*, *supra*, at 308.

While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. An application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged. Such rules are widely accepted and are not challenged here.

In *Gregory*, the South Carolina Supreme Court adopted and applied a rule intended to be of this type. In *Gay* and this case, however, that court radically changed and extended the *Gregory* rule by holding that, where there is strong evidence of a defendant's guilt, especially strong forensic evidence, proffered evidence about a third party's alleged guilt may (or perhaps must) be excluded. Under this rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues. Furthermore, as applied below, the rule seems to call for little, if any, examination of the credibility of the prosecution's witnesses or the reliability of its evidence.

By evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied below did not heed this point, the rule is "arbitrary" in the sense that it does not rationally serve the end that the *Gregory* rule and other similar third-party guilt rules were designed to further. Nor has the State identified any other legitimate end served by

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the rule. Thus, the rule violates a criminal defendant's right to have "'a meaningful opportunity to present a complete defense.'" *Crane, supra*, at 690. Pp. 4–11.

361 S. C. 333, 605 S. E. 2d 19, vacated and remanded.

ALITO, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–1327

BOBBY LEE HOLMES, PETITIONER *v.* SOUTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

[May 1, 2006]

JUSTICE ALITO delivered the opinion of the Court.

This case presents the question whether a criminal defendant's federal constitutional rights are violated by an evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict.

I

On the morning of December 31, 1989, 86-year-old Mary Stewart was beaten, raped, and robbed in her home. She later died of complications stemming from her injuries. Petitioner was convicted by a South Carolina jury of murder, first-degree criminal sexual conduct, first-degree burglary, and robbery, and he was sentenced to death. *State* v. *Holmes*, 320 S. C. 259, 262, 464 S. E. 2d 334, 336 (1995). The South Carolina Supreme Court affirmed his convictions and sentence, and this Court denied certiorari. *Ibid.*, cert. denied, 517 U. S. 1248 (1996). Upon state postconviction review, however, petitioner was granted a new trial. 361 S. C. 333, 335, n. 1, 605 S. E. 2d 19, 20, n. 1 (2004).

At the second trial, the prosecution relied heavily on the following forensic evidence:

> "(1) [Petitioner's] palm print was found just above the door knob on the interior side of the front door of the victim's house; (2) fibers consistent with a black sweatshirt owned by [petitioner] were found on the victim's bed sheets; (3) matching blue fibers were found on the victim's pink nightgown and on [petitioner's] blue jeans; (4) microscopically consistent fibers were found on the pink nightgown and on [petitioner's] underwear; (5) [petitioner's] underwear contained a mixture of DNA from two individuals, and 99.99% of the population other than [petitioner] and the victim were excluded as contributors to that mixture; and (6) [petitioner's] tank top was found to contain a mixture of [petitioner's] blood and the victim's blood." *Id.*, at 343, 605 S. E. 2d, at 24.

In addition, the prosecution introduced evidence that petitioner had been seen near Stewart's home within an hour of the time when, according to the prosecution's evidence, the attack took place. *Id.*, at 337–338, 343, 605 S. E. 2d, at 21, 24.

As a major part of his defense, petitioner attempted to undermine the State's forensic evidence by suggesting that it had been contaminated and that certain law enforcement officers had engaged in a plot to frame him. *Id.*, at 339, 605 S. E. 2d, at 22. Petitioner's expert witnesses criticized the procedures used by the police in handling the fiber and DNA evidence and in collecting the fingerprint evidence. App. 299–311, 313–323. Another defense expert provided testimony that petitioner cited as supporting his claim that the palm print had been planted by the police. *Id.*, at 326–327.

Petitioner also sought to introduce proof that another man, Jimmy McCaw White, had attacked Stewart. 361

S. C., at 340, 605 S. E. 2d, at 22. At a pretrial hearing, petitioner proffered several witnesses who placed White in the victim's neighborhood on the morning of the assault, as well as four other witnesses who testified that White had either acknowledged that petitioner was "'innocent'" or had actually admitted to committing the crimes. *Id.*, at 340–342, 605 S. E. 2d, at 22–23. One witness recounted that when he asked White about the "word . . . on the street" that White was responsible for Stewart's murder, White "put his head down and he raised his head back up and he said, well, you know I like older women." App. 119. According to this witness, White added that "he did what they say he did" and that he had "no regrets about it at all." *Id.*, at 120. Another witness, who had been incarcerated with White, testified that White had admitted to assaulting Stewart, that a police officer had asked the witness to testify falsely against petitioner, and that employees of the prosecutor's office, while soliciting the witness' cooperation, had spoken of manufacturing evidence against petitioner. *Id.*, at 38–50. White testified at the pretrial hearing and denied making the incriminating statements. 361 S. C., at 341–342, 605 S. E. 2d, at 23. He also provided an alibi for the time of the crime, but another witness refuted his alibi. *Id.*, at 342, 605 S. E. 2d, at 23.

The trial court excluded petitioner's third-party guilt evidence citing *State* v. *Gregory*, 198 S. C. 98, 16 S. E. 2d 532 (1941), which held that such evidence is admissible if it "'raise[s] a reasonable inference or presumption as to [the defendant's] own innocence'" but is not admissible if it merely "'cast[s] a bare suspicion upon another'" or "'raise[s] a conjectural inference as to the commission of the crime by another.'" App. 133–134 (quoting *Gregory*, *supra*, at 104, 16 S. E. 2d, at 534). On appeal, the South Carolina Supreme Court found no error in the exclusion of petitioner's third-party guilt evidence. Citing both *Gregory* and its

later decision in *State* v. *Gay*, 343 S. C. 543, 541 S. E. 2d 541 (2001), the State Supreme Court held that "where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." 361 S. C., at 342–343, 605 S. E. 2d, at 24. Applying this standard, the court held that petitioner could not "overcome the forensic evidence against him to raise a reasonable inference of his own innocence." *Id.*, at 343, 605 S. E. 2d, at 24. We granted certiorari. 545 U. S. ___ (2005).

II

"[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *United States* v. *Scheffer*, 523 U. S. 303, 308 (1998); see also *Crane* v. *Kentucky*, 476 U. S. 683, 689–690 (1986); *Marshall* v. *Lonberger*, 459 U. S. 422, 438, n. 6 (1983); *Chambers* v. *Mississippi*, 410 U. S. 284, 302–303 (1973); *Spencer* v. *Texas*, 385 U. S. 554, 564 (1967). This latitude, however, has limits. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane*, *supra*, at 690 (quoting *California* v. *Trombetta*, 467 U. S. 479, 485 (1984); citations omitted). This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, *supra*, at 308 (quoting *Rock* v. *Arkansas*, 483 U. S. 44, 58, 56 (1987)).

This Court's cases contain several illustrations of "arbitrary" rules, *i.e.*, rules that excluded important defense evidence but that did not serve any legitimate interests. In *Washington* v. *Texas*, 388 U. S. 14 (1967), state statutes

barred a person who had been charged as a participant in a crime from testifying in defense of another alleged participant unless the witness had been acquitted. As a result, when the defendant in *Washington* was tried for murder, he was precluded from calling as a witness a person who had been charged and previously convicted of committing the same murder. Holding that the defendant's right to put on a defense had been violated, we noted that the rule embodied in the statutes could not "even be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury" since the rule allowed an alleged participant to testify if he or she had been acquitted or was called by the prosecution. *Id.*, at 22–23.

A similar constitutional violation occurred in *Chambers* v. *Mississippi*, *supra*. A murder defendant called as a witness a man named McDonald, who had previously confessed to the murder. When McDonald repudiated the confession on the stand, the defendant was denied permission to examine McDonald as an adverse witness based on the State's "'voucher' rule," which barred parties from impeaching their own witnesses. *Id.*, at 294. In addition, because the state hearsay rule did not include an exception for statements against penal interest, the defendant was not permitted to introduce evidence that McDonald had made self-incriminating statements to three other persons. Noting that the State had not even attempted to "defend" or "explain [the] underlying rationale" of the "voucher rule," *id.*, at 297, this Court held that "the exclusion of [the evidence of McDonald's out-of-court statements], coupled with the State's refusal to permit [the defendant] to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process," *id.*, at 302.

Another arbitrary rule was held unconstitutional in *Crane* v. *Kentucky*, *supra*. There, the defendant was pre-

vented from attempting to show at trial that his confession was unreliable because of the circumstances under which it was obtained, and neither the State Supreme Court nor the prosecution "advanced any rational justification for the wholesale exclusion of this body of potentially exculpatory evidence." *Id.*, at 691.

In *Rock* v. *Arkansas*, *supra*, this Court held that a rule prohibiting hypnotically refreshed testimony was unconstitutional because "[w]holesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all post-hypnotic recollections." *Id.*, at 61. By contrast, in *United States* v. *Scheffer*, *supra*, we held that a rule excluding all polygraph evidence did not abridge the right to present a defense because the rule "serve[d] several legitimate interests in the criminal trial process," was "neither arbitrary nor disproportionate in promoting these ends," and did not "implicate a sufficiently weighty interest of the defendant." *Id.*, at 309.

While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. See, *e.g.*, Fed. Rule Evid. 403; Uniform Rule of Evid. 45 (1953); ALI, Model Code of Evidence Rule 303 (1942); 3 J. Wigmore, Evidence §§1863, 1904 (1904). Plainly referring to rules of this type, we have stated that the Constitution permits judges "to exclude evidence that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" *Crane*, *supra*, at 689–690 (quoting *Delaware* v. *Van Arsdall*, 475 U. S. 673, 679 (1986); ellipsis and brackets in original). See also *Montana* v. *Egelhoff*, 518 U. S. 37,

42 (1996) (plurality opinion) (terming such rules "familiar and unquestionably constitutional").

A specific application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged. See, *e.g.*, 41 C. J. S., Homicide §216, pp. 56–58 (1991) ("Evidence tending to show the commission by another person of the crime charged may be introduced by accused when it is inconsistent with, and raises a reasonable doubt of, his own guilt; but frequently matters offered in evidence for this purpose are so remote and lack such connection with the crime that they are excluded"); 40A Am. Jur. 2d, Homicide §286, pp. 136–138 (1999) ("[T]he accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged .... [Such evidence] may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial" (footnotes omitted)). Such rules are widely accepted,* and neither petitioner

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* See, *e.g.*, *Smithart* v. *State*, 988 P. 2d 583, 586–587 (Alaska 1999); *Shields* v. *State*, 357 Ark. 283, 287–288, 166 S. W. 3d 28, 32 (2004); *People* v. *Hall*, 41 Cal. 3d 826, 833, 718 P. 2d 99, 103–104 (1986) (en banc); *People* v. *Mulligan*, 193 Colo. 509, 517–518, 568 P. 2d 449, 456–457 (1977) (en banc); *State* v. *West*, 274 Conn. 605, 624–627, 877 A. 2d 787, 802–803 (2005); *Winfield* v. *United States*, 676 A. 2d 1 (DC App. 1996) (en banc); *Klinect* v. *State*, 269 Ga. 570, 573, 501 S. E. 2d 810, 813–814 (1998); *State* v. *Rabellizsa*, 79 Haw. 347, 350–351, 903 P. 2d 43, 46–47 (1995); *People* v. *Fort*, 248 Ill. App. 3d 301, 314, 618 N. E. 2d 445, 455 (1993); *State* v. *Adams*, 280 Kan. 494, 504–507, 124 P. 3d 19, 27–29 (2005); *Beaty* v. *Commonwealth*, 125 S. W. 3d 196, 207–208 (Ky. 2003); *State* v. *Dechaine*, 572 A. 2d 130, 134 (Me. 1990); *Commonwealth* v. *Scott*, 408 Mass. 811, 815–816, 564 N. E. 2d 370, 374–375 (1990); *State* v. *Jones*, 678 N. W. 2d 1, 16–17 (Minn. 2004); *Moore* v. *State*, 179 Miss. 268, 274–275, 175 So. 183, 184 (1937); *State* v. *Chaney*, 967 S. W. 2d 47, 55 (Mo. 1998) (en banc); *State* v. *Cotto*, 182 N. J. 316, 332–333,

nor his *amici* challenge them here.

In *Gregory*, the South Carolina Supreme Court adopted and applied a rule apparently intended to be of this type, given the court's references to the "applicable rule" from Corpus Juris and American Jurisprudence:

> "'[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.'" 198 S. C., at 104–105, 16 S. E. 2d, at 534–535 (quoting 16 C. J., Criminal Law §1085, p. 560 (1918) and 20 Am. Jur., Evidence §265, p. 254 (1939); footnotes omitted).

In *Gay* and this case, however, the South Carolina Supreme Court radically changed and extended the rule. In *Gay*, after recognizing the standard applied in *Gregory*, the court stated that "[i]n view of the strong evidence of appellant's guilt—especially the forensic evidence—. . . the proffered evidence . . . did not raise 'a reasonable inference' as to appellant's own innocence." *Gay*, 343 S. C., at

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865 A. 2d 660, 669–670 (2005); *Gore* v. *State*, 2005 OK CR 14, ¶¶13–24, 119 P. 3d 1268, 1272–1276; *State* v. *Gregory*, 198 S. C. 98, 104–105, 16 S. E. 2d 532, 534–535 (1941); *Wiley* v. *State*, 74 S. W. 3d 399, 405–408 (Tex. Crim. App. 2002); *State* v. *Gregoi*, 168 Vt. 363, 375, 721 A. 2d 445, 454 (1998); *State* v. *Thomas*, 150 Wash. 2d 821, 856–858, 83 P. 3d 970, 988 (2004) (en banc); *State* v. *Parr*, 207 W. Va. 469, 475, 534 S. E. 2d 23, 29 (2000) *(per curiam)*; *State* v. *Denny*, 120 Wis. 2d 614, 622–625, 357 N. W. 2d 12, 16–17 (Wis. App. 1984).

550, 541 S. E. 2d, at 545 (quoting *Gregory*, *supra*, at 104, 16 S. E. 2d, at 534, in turn quoting 16 C. J., §1085, at 560). Similarly, in the present case, as noted, the State Supreme Court applied the rule that "where there is strong evidence of [a defendant's] guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt" may (or perhaps must) be excluded. 361 S. C., at 342, 605 S. E. 2d, at 24.

Under this rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues.

Furthermore, as applied in this case, the South Carolina Supreme Court's rule seems to call for little, if any, examination of the credibility of the prosecution's witnesses or the reliability of its evidence. Here, for example, the defense strenuously claimed that the prosecution's forensic evidence was so unreliable (due to mishandling and a deliberate plot to frame petitioner) that the evidence should not have even been admitted. The South Carolina Supreme Court responded that these challenges did not entirely "eviscerate" the forensic evidence and that the defense challenges went to the weight and not to the admissibility of that evidence. *Id.*, at 343, n. 8, 605 S. E. 2d, at 24, n. 8. Yet, in evaluating the prosecution's forensic evidence and deeming it to be "strong"—and thereby justifying exclusion of petitioner's third-party guilt evidence—the South Carolina Supreme Court made no mention of the defense challenges to the prosecution's evidence.

Interpreted in this way, the rule applied by the State Supreme Court does not rationally serve the end that the

Gregory rule and its analogues in other jurisdictions were designed to promote, *i.e.*, to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues. The rule applied in this case appears to be based on the following logic: Where (1) it is clear that only one person was involved in the commission of a particular crime and (2) there is strong evidence that the defendant was the perpetrator, it follows that evidence of third-party guilt must be weak. But this logic depends on an accurate evaluation of the prosecution's proof, and the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence. Just because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. And where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact and that the South Carolina courts did not purport to make in this case.

The rule applied in this case is no more logical than its converse would be, *i.e.*, a rule barring the prosecution from introducing evidence of a defendant's guilt if the defendant is able to proffer, at a pretrial hearing, evidence that, if believed, strongly supports a verdict of not guilty. In the present case, for example, the petitioner proffered evidence that, if believed, squarely proved that White, not petitioner, was the perpetrator. It would make no sense, however, to hold that this proffer precluded the prosecution from introducing its evidence, including the forensic evidence that, if credited, provided strong proof of the petitioner's guilt.

The point is that, by evaluating the strength of only one

party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied by the State Supreme Court in this case did not heed this point, the rule is "arbitrary" in the sense that it does not rationally serve the end that the *Gregory* rule and other similar third-party guilt rules were designed to further. Nor has the State identified any other legitimate end that the rule serves. It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have "'a meaningful opportunity to present a complete defense.'" *Crane*, 476 U. S., at 690 (quoting *Trombetta*, 467 U. S., at 485).

III

For these reasons, we vacate the judgment of the South Carolina Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.